

## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### B. Fraudulent Intent; Knowledge; Notice

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162, 282, 295.2, 298(.5), 308(1)

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162, 282, 295.2, 298(.5), 308(1)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 8

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### B. Fraudulent Intent; Knowledge; Notice

### § 8. Generally; mutual fraudulent intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 282

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 130](#) (Jury instructions—Mutual fraudulent intent by parties to transaction)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 131](#) (Jury instructions—Intent to defraud specific creditor)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 132 to 134](#) (Jury instructions—Transferee's knowledge of fraudulent intent)

As far as fraudulent conveyances are concerned, the debtor-transferor's intent<sup>1</sup> or state of mind is the focus, or point of inquiry,<sup>2</sup> and malice, insolvency,<sup>3</sup> and motive are irrelevant.<sup>4</sup>

#### Caution:

In the constructive fraud context, no finding with regard to the state of mind of the transferor is necessary.<sup>5</sup>

However, according to some courts, intent on part of the transferor is not enough. There must be a corresponding intent on the part of the transferee,<sup>6</sup> alternatively formulated as an intent participated in by the transferee or grantee<sup>7</sup> or an intent imputable to the grantee.<sup>8</sup> According to these courts, the transferee's notice of the transferor's fraudulent intent must be alleged,<sup>9</sup> and where the transferee purchases property for a fair consideration and with no knowledge of the transferor's fraudulent intent, the conveyance may not be set aside.<sup>10</sup> Other courts have stated that a transferee's intent is irrelevant in finding a fraudulent conveyance<sup>11</sup> and that whether transferees knowingly participated in that fraud is irrelevant for purposes of establishing the premise of, as opposed to liability for, a fraudulent transfer.<sup>12</sup>

**Practice Tip:**

The plaintiff must establish the actual fraudulent intent of the transferor and need not plead the actual fraudulent intent of the transferee.<sup>13</sup> The intent of the transferee only becomes relevant as an affirmative defense if the defendant is not the initial transferee.<sup>14</sup>

However, it is not necessary to prove that the grantee had positive knowledge of the grantor's fraudulent intent; it is sufficient to prove that the grantee had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of persons of ordinary care and prudence, and which would naturally prompt him or her to pause and inquire before consummating the transaction, and to prove that such inquiry would have necessarily led to a discovery of the facts from which the law imputes fraud to the grantor.<sup>15</sup>

**Observation:**

In order to determine a debtor's actual intent, the Uniform Fraudulent Transfer Act, adopted by numerous states, provides that consideration may be given, among other factors, to whether:<sup>16</sup>

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;

- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

This list is nonexclusive, and the courts may consider other factors in determining the debtor's intent.<sup>17</sup> These factors do not create a mathematical formula to establish actual intent, and there is no minimum number of factors that must be present before the scales tip in favor of a finding of actual intent to defraud.<sup>18</sup>

Still, other courts recognize "fraud in fact" which is a conveyance where a party must prove that the transfers were made with the actual intent to hinder, delay, or defraud the creditors.<sup>19</sup> Similarly, courts have permitted creditors to move under a theory of "intentional fraud" which also requires a showing of intent.<sup>20</sup> Under an "intentional fraud" provision, actual intent to hinder, delay, or defraud need not be proven by direct evidence but may be inferred where a conveyance is made without fair consideration.<sup>21</sup>

**Observation:**

Proof of fraud is not an aspect of a fraudulent transfer claim.<sup>22</sup>

## CUMULATIVE SUPPLEMENT

**Cases:**

Genuine issues of material fact existed as to whether transfer of assets from Postal Service customer to transferee was actually or constructively fraudulent under federal law, Pennsylvania law and/or District of Columbia law, whether the transfer to transferee was to an "insider," whether customer retained possession or control of the property, whether the transfer was of substantially all the transferee's assets, and whether customer was insolvent, precluding summary judgment in favor of transferee and the corporation which held a controlling interest in transferee, or in favor of Postal Service on its claim to recover deficiency assessed against customer based on fraudulent transfer theory. 28 U.S.C.A. § 3304; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.;

12 Pa.C.S.A. § 5104(a); D.C. Official Code, 2001 Ed. § 28–3104. *Reese Bros., Inc. v. U.S. Postal Service*, 905 F. Supp. 2d 223 (D.D.C. 2012).

**[END OF SUPPLEMENT]**

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Footnotes

- 1 *S.E.C. v. Resource Development Intern., LLC*, 487 F.3d 295 (5th Cir. 2007) (applying Texas law); *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289 (D. Del. 2012) (applying Delaware law); *In re Jacobs*, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 2 *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011); *Glimcher Supermall Venture, LLC v. Coleman Co.*, 2007 SD 98, 739 N.W.2d 815 (S.D. 2007); *Cadle Co. v. Wilson*, 136 S.W.3d 345 (Tex. App. Austin 2004).  
Inquiry as to whether transfer was made with intent to hinder, delay, or defraud creditors goes to a subjective state of mind on the part of the grantor-transferor. *In re Polaroid Corp.*, 472 B.R. 22 (Bankr. D. Minn. 2012) (applying Minnesota law).
- 3 *CB Richard Ellis, Inc. v. CLGP, LLC*, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 *Comer v. Calim*, 128 Ohio App. 3d 599, 716 N.E.2d 245 (1st Dist. Hamilton County 1998).
- 5 *In re Eubanks*, 444 B.R. 415 (Bankr. E.D. Ark. 2010) (applying Arkansas law).
- 6 *In re Kovler*, 249 B.R. 238 (Bankr. S.D. N.Y. 2000), opinion supplemented on other grounds, 253 B.R. 592 (Bankr. S.D. N.Y. 2000) and corrected, 329 B.R. 17 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 7 *In re Fabian*, 458 B.R. 235 (Bankr. D. Md. 2011), aff'd, 475 B.R. 463 (D. Md. 2012) (applying Maryland law); *Abbott Terrace Health Center, Inc. v. Parawich*, 120 Conn. App. 78, 990 A.2d 1267 (2010).
- 8 *In re Amelung*, 436 B.R. 806 (Bankr. D. S.C. 2010) (applying South Carolina law).
- 9 *In re Taneja*, 453 B.R. 618 (Bankr. E.D. Va. 2011) (applying Virginia law).
- 10 *Motorola, Inc. v. Abeckaser*, 2010 WL 415290 (E.D. N.Y. 2010) (applying New York law).
- 11 *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289 (D. Del. 2012) (applying Delaware law).
- 12 *S.E.C. v. Resource Development Intern., LLC*, 487 F.3d 295 (5th Cir. 2007) (applying Texas law).
- 13 *In re Dreier LLP*, 452 B.R. 451 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 14 *In re Jacobs*, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 15 *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 16 *Unif. Fraudulent Transfer Act* § 4(b).  
The Uniform Fraudulent Conveyance Act, which is applicable in some states, merely provides that every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. *Unif. Fraudulent Conveyance Act* § 7.  
As to these considerations, see generally, §§ 8 to 11.
- 17 *In re Jennings*, 332 B.R. 465 (Bankr. M.D. Fla. 2005), order aff'd, 2006 WL 6829886 (M.D. Fla. 2006) (applying Florida law); *Hahn v. Love*, 321 S.W.3d 517 (Tex. App. Houston 1st Dist. 2009).
- 18 *In re Beverly*, 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law); *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190 (Ind. 2012).
- 19 *In re Gluth Bros. Const., Inc.*, 424 B.R. 368 (Bankr. N.D. Ill. 2009) (applying Illinois law); *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
- 20 *In re Janz*, 140 B.R. 256 (Bankr. D. N.D. 1991), subsequently aff'd, 980 F.2d 734 (8th Cir. 1992).
- 21 *In re Cassandra Group*, 338 B.R. 583 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 22 *U.S. Bank Nat. Ass'n v. Verizon Communications Inc.*, 479 B.R. 405 (N.D. Tex. 2012).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 9

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### B. Fraudulent Intent; Knowledge; Notice

### § 9. Intent to hinder or delay creditors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  11

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 129](#) (Jury instructions—Actual intent to delay, hinder, or defraud)

Proof of an intent to hinder or delay creditors is sufficient to establish a fraudulent transfer claim.<sup>1</sup> The courts may consider badges of fraud<sup>2</sup> in deciding whether assets were converted with the requisite fraudulent intent and may take into account the particular facts surrounding the challenged conveyance as well.<sup>3</sup>

#### Observation:

A debtor's intent to defraud clients when misappropriating funds is not an intent to defraud the debtor's creditors as required to avoid transfers as actually fraudulent as to creditors.<sup>4</sup>

The existence of a debtor's intent to hinder, delay, or defraud either present or future creditors, which is sometimes referred to as "fraud in fact,"<sup>5</sup> permits a court to set aside a conveyance made with such intent<sup>6</sup> regardless of whether a fair consideration has been paid<sup>7</sup> and even though the debtor was solvent at the time of the transfer.<sup>8</sup> The intent must have existed at the time the transfer was made.<sup>9</sup> Thus, in order to set a transfer aside as having been made with an actual intent to hinder, delay, or defraud creditors, one court has stated that the plaintiff must establish:

- (1) that the thing transferred has value, out of which the creditor could have realized a portion of its claim;
- (2) that this thing was transferred or disposed of by the debtor; and
- (3) that the transfer was done with actual intent to defraud.<sup>10</sup>

Other courts have characterized these requirements as (1) that the transfer was made by the transferor with the actual intent of defrauding creditors, (2) that the transferor was indebted at the time of the transfer, and (3) that the transferor's intent is either imputable to the transferee, or the transferee had knowledge of the fraud at the time of the purchase or transfer.<sup>11</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Loan repayments to lender from separate company affiliated with operator of Ponzi scheme were not made with fraudulent intent, as required for claim under Minnesota Uniform Fraudulent Transfer Act (MUFTA), since legitimate business transactions were financed with capital from lender, loans were repaid through proceeds of "real life" transactions, and proceeds of loans were not diverted to Ponzi scheme being perpetrated by operator. [11 U.S.C.A. § 544. \*Stoebner v. Opportunity Finance, LLC\*, 909 F.3d 219 \(8th Cir. 2018\).](#)

Under the Florida Uniform Fraudulent Transfer Act (FUFTA), transfer by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. [West's F.S.A. § 726.105\(1\)\(a\). \*TempPay, Inc. v. Biltres Staffing of Tampa Bay, LLC\*, 945 F. Supp. 2d 1331 \(M.D. Fla. 2013\).](#)

In determining a debtor's actual intent in making a transfer of assets and whether it was to "hinder, delay, or defraud any creditor of the debtor," Florida's Uniform Fraudulent Transfer Act (UFTA) looks to indicia of intent commonly known as badges of fraud. [West's F.S.A. § 726.105\(1\)\(a\), \(2\)\(a-k\). \*National Maritime Services, Inc. v. Straub\*, 979 F. Supp. 2d 1322 \(S.D. Fla. 2013\).](#)

Chapter 13 debtor's prepetition grant of security interest to individual creditor, in the form of a note and deed of trust, was done with intent to hinder and delay assertion of a secured claim by corporate creditor, and so was avoidable on the basis of actual fraud under the California Uniform Fraudulent Transfer Act (UFTA); individual creditor discovered that debtor, a bookkeeper, had fraudulently obtained funds from several clients, including himself and corporate creditor, debtor was able to reach settlement agreements with some of her clients but not with corporate creditor, which filed a state-court lawsuit against her, through individual creditor's sympathy for debtor a special relationship was continued or created between them, debtor preferred that individual creditor receive any available money before corporate creditor, and as her former clients researched



their claims, debtor faced a growing and unmanageable insolvency. 11 U.S.C.A. § 544; Cal. Civ. Code § 3439.04(a)(1). In re Martinez, 610 B.R. 290 (Bankr. N.D. Cal. 2019).

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Footnotes

- 1 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law); Apollo Real Estate Investment Fund, IV, L.P. v. Gelber, 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).
- 2 §§ 12 to 17.
- 3 In re Jennings, 332 B.R. 465 (Bankr. M.D. Fla. 2005), order aff'd, 2006 WL 6829886 (M.D. Fla. 2006) (applying Florida law); In re Lexington Oil and Gas Ltd., Co., 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law).
- 4 In re Kennedy, 279 B.R. 455 (Bankr. D. Conn. 2002) (applying Connecticut law).
- 5 In re Spatz, 222 B.R. 157 (N.D. Ill. 1998) (applying Illinois law).
- 6 Arvest Bank v. Byrd, 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); Clayton v. Wilson, 168 Wash. 2d 57, 227 P.3d 278 (2010).
- 7 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law).  
Generally, as to the effect of a lack of consideration in determining the character of a conveyance, see § 26.
- 8 In re Sharp Intern. Corp., 302 B.R. 760 (E.D. N.Y. 2003), aff'd, 403 F.3d 43 (2d Cir. 2005) (applying New York law).  
Generally, as to the importance of solvency or insolvency in determining the character of a conveyance, see §§ 18 to 24.
- 9 Neubauer v. Cloutier, 265 Minn. 539, 122 N.W.2d 623 (1963).
- 10 In re Monahan Ford Corp. of Flushing, 340 B.R. 1 (Bankr. E.D. N.Y. 2006) (applying New York law).
- 11 In re Derivium Capital, LLC, 380 B.R. 407 (Bankr. D. S.C. 2006) (applying South Carolina law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 10

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### B. Fraudulent Intent; Knowledge; Notice

### § 10. Character and proof of intent or knowledge

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 295.2, 298(.5), 308(1)

Fraudulent intent, which can be characterized as deception intentionally practiced to frustrate the legal rights of another,<sup>1</sup> is a question of fact.<sup>2</sup> It is determined by the facts and circumstances of each case,<sup>3</sup> and proof of intent must be made by clear and convincing evidence.<sup>4</sup> However, direct evidence of fraud is not essential,<sup>5</sup> and a finding of fraudulent intent may be arrived at by way of inference or presumption<sup>6</sup> though proof of the fraudulent intent must exist at the time of the transfer, not subsequent to it.<sup>7</sup> Furthermore, it is not necessary that the debtor have exhibited intent as to the specific creditor bringing the fraudulent transfer claim.<sup>8</sup>

In proving intent, an evil motive is not required,<sup>9</sup> and the courts recognize that conveyances can be "actually fraudulent" if made with actual intent as distinguished from intent which is presumed in law.<sup>10</sup> The courts also recognize that fraudulent intent is rarely susceptible to direct evidence, and thus, it may be gleaned from the circumstances surrounding the alleged fraudulent transaction.<sup>11</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Intent to hinder, delay or defraud, of kind required under California law in order to avoid transfer as actually fraudulent to creditors, may be established inferentially from the surrounding circumstances. [Cal. Civ. Code § 3439.04\(b\)](#). [In re Ezra](#), 537 B.R. 924 (B.A.P. 9th Cir. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 Southern Industries, Inc. v. Jeremias, 66 A.D.2d 178, 411 N.Y.S.2d 945 (2d Dep't 1978).
- 2 In re Still, 393 B.R. 896 (Bankr. C.D. Cal. 2008) (applying California law); Filip v. Bucurenciu, 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005); Hoesman v. Sheffler, 886 N.E.2d 622 (Ind. Ct. App. 2008); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 3 In re Jackson, 318 B.R. 5, 2004 BNH 26 (Bankr. D. N.H. 2004), subsequently aff'd, 459 F.3d 117 (1st Cir. 2006) (applying New Hampshire law); In re Cassandra Group, 312 B.R. 491 (Bankr. S.D. N.Y. 2004) (applying New York law); Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130 (Mo. Ct. App. S.D. 2004); Blood v. Nofzinger, 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 4 Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743 (7th Cir. 2012) (applying Illinois law); First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); U.S. Bancorp Equipment Finance, Inc. v. Rubashkin, 98 A.D.3d 1057, 950 N.Y.S.2d 767 (2d Dep't 2012); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 Blood v. Nofzinger, 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 6 Warfield v. Alaniz, 453 F. Supp. 2d 1118 (D. Ariz. 2006), aff'd, 569 F.3d 1015 (9th Cir. 2009) (applying Arizona law); Amusement Industry, Inc. v. Midland Avenue Associates, LLC, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); In re Still, 393 B.R. 896 (Bankr. C.D. Cal. 2008) (applying California law); Filip v. Bucurenciu, 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005).
- 7 Palmer v. Murphy, 42 Mass. App. Ct. 334, 677 N.E.2d 247 (1997).
- 8 Tiab Communications Corp. v. Keymarket of Nepa, Inc., 263 F. Supp. 2d 925 (M.D. Pa. 2003) (applying Pennsylvania law); In re Ducate, 355 B.R. 536 (Bankr. D. S.C. 2006) (applying South Carolina law).
- 9 Aristocrat Lakewood Nursing Home v. Mayne, 133 Ohio App. 3d 651, 729 N.E.2d 768 (8th Dist. Cuyahoga County 1999).
- 10 Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC, 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law).
- 11 U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); Amusement Industry, Inc. v. Midland Avenue Associates, LLC, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); Arvest Bank v. Byrd, 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); In re Polaroid Corp., 472 B.R. 22 (Bankr. D. Minn. 2012) (applying Minnesota law); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 11

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### B. Fraudulent Intent; Knowledge; Notice

### § 11. Character and proof of intent or knowledge—Transferee's participation or knowledge; circumstances putting transferee on notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  9, 11, 155, 156, 158(.5), 162

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 46](#) (Complaint—Allegation—Participation in fraud—By transferee)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 134](#) (Jury instructions—Transferee's knowledge of fraudulent intent—As precluding bona fide purchaser status)

The relevant inquiry as to the transferee in an allegedly fraudulent conveyance is whether the transferee knew of the transferor's intent to defraud his or her creditors in any way. The transferee need not have actual knowledge of the scheme that renders a conveyance fraudulent; constructive knowledge of the scheme to defraud will also suffice.<sup>1</sup> The transferee's intent may thus be established by constructive or actual knowledge of the fraudulent scheme on the part of the transferee.<sup>2</sup> The test is whether the transferee had notice or constructive knowledge of facts or circumstances which would induce an ordinarily prudent person to make inquiry as to the purpose of the transfer<sup>3</sup> and whether the inquiry, if made with reasonable diligence, would have led to the discovery of the debtor's fraudulent purpose<sup>4</sup> or facts from which the law imputes fraud to the grantor.<sup>5</sup>

Fraudulent transfers are not void against bona fide transferees without knowledge of fraudulent intent.<sup>6</sup> The fraudulent transfer statute protects the transferee for value only if the transferee is unaware of the transferor's fraudulent intent, in which case the

statute does not affect the title of the purchaser for valuable consideration.<sup>7</sup> It is not necessary to prove that a transferee is an insider in order to prove the transferee's knowledge of the transferor's fraudulent intent.<sup>8</sup> Because a good-faith defense requires the fact finder to determine whether the investor had sufficient knowledge to place him or her on inquiry notice of the voidability of the transfer, the courts typically assess whether the investors ignored red flags revealing the true nature of the challenged investment.<sup>9</sup> Inquiry into whether the transferee acted in "good faith" focuses on the transferee's knowledge of the transferor's fraudulent intent; "good faith" is lacking where the transferee knew, or should have known, that the transferor was not trading normally but that the purpose of the trade, so far as the transferor was concerned, was defrauding creditors.<sup>10</sup>

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#### Footnotes

- 1 [In re Actrade Financial Technologies Ltd.](#), 337 B.R. 791 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 2 [Snodgrass v. Baumgart](#), 25 Kan. App. 2d 812, 974 P.2d 604 (1999).
- 3 [In re Seminole Walls & Ceilings Corp.](#), 446 B.R. 572 (Bankr. M.D. Fla. 2011) (applying Florida law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 4 [In re Seminole Walls & Ceilings Corp.](#), 446 B.R. 572 (Bankr. M.D. Fla. 2011) (applying Florida law).
- 5 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 6 [Balzer and Associates, Inc. v. The Lakes on 360, Inc.](#), 250 Va. 527, 463 S.E.2d 453 (1995).
- 7 [In re Tarangelo](#), 378 B.R. 128 (Bankr. E.D. Va. 2007) (applying Virginia law).
- 8 [Hahn v. Love](#), 321 S.W.3d 517 (Tex. App. Houston 1st Dist. 2009).
- 9 [Hecht v. Malvern Preparatory School](#), 716 F. Supp. 2d 395 (E.D. Pa. 2010) (applying Pennsylvania law).
- 10 [In re Dreier LLP](#), 462 B.R. 474 (Bankr. S.D. N.Y. 2011) (applying New York law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II C Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

#### C. Indicia or Badges of Fraud

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8 to 10, 14 to 16, 66, 162.1

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  8 to 10, 14 to 16, 66, 162.1

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 12

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### II. Elements, Factors, and Requisites

#### C. Indicia or Badges of Fraud

## § 12. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  14

Certain circumstances relating to defrauding creditors are characterized as "badges of fraud" because they are circumstances tending to excite suspicion as to the conveyance, which, standing unexplained, may warrant an inference of fraud.<sup>1</sup> In other words, badges of fraud are circumstantial evidence from which intent may be inferred.<sup>2</sup> Indeed, certain circumstances are so commonly associated with fraud as to have earned the title "badges of fraud," and when present in sufficient number, they may give rise to an inference or presumption of fraud.<sup>3</sup> Badges of fraud can also establish a prima facie case of a fraudulent conveyance.<sup>4</sup> Badge of frauds, therefore, are circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent.<sup>5</sup> The test is whether there is a satisfactory explanation for the circumstance,<sup>6</sup> which may be inferred by a failure of the parties to testify or to produce available explanatory or rebutting evidence.<sup>7</sup> "Badges of fraud" are therefore facts which call for an explanation.<sup>8</sup>

### CUMULATIVE SUPPLEMENT

#### Cases:

Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader seeking to set aside a conveyance as based on actual fraud under New York law is allowed to rely on badges of fraud to support his case, that is, circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. [N.Y.McKinney's Debtor and Creditor Law § 276](#). [Priestley v. Panmedix Inc.](#), 18 F. Supp. 3d 486 (S.D. N.Y. 2014).

Under California law, there is no minimum number of badges of fraud that must be found in order to prove intentional fraudulent conveyance. [Cal. Civ. Code § 3439.04\(b\)](#). [AKH Company, Inc. v. Universal Underwriters Insurance Co.](#), 428 F. Supp. 3d 536 (D. Kan. 2019).

Badges of fraud that do not implicitly suggest fraud but do suggest there must have been a motivation other than the transaction itself because it was not an economically rational decision for a debtor to make but for its effect to hinder or delay creditors, for purposes of fraudulent transfer claim under Pennsylvania Uniform Voidable Transfer Act (PUVTA), include: the transfer or obligation was to an insider; the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; and the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. 12 Pa. Stat. Ann. § 5104(b). [In re Carbone](#), 615 B.R. 76 (Bankr. E.D. Pa. 2020).

Four factors that Texas courts consider in deciding whether challenged transfer was made for a legitimate purpose, of kind sufficient to rebut presumption of fraud arising from presence of multiple badges of fraud, are whether transfer: (1) was made pursuant to standard business practice; (2) was arm's-length transaction; (3) was voluntary or effectively forced upon debtor; and (4) was for proper consideration. [V.T.C.A., Bus. & C. § 24.005\(b\)](#). [In re 1701 Commerce, LLC](#), 511 B.R. 812 (Bankr. N.D. Tex. 2014).

Judgment creditors' fraudulent conveyance claims against judgment debtor defendants were pled in sufficient detail to satisfy the heightened particularity requirement for pleading fraud or mistake; judgment creditors properly relied on various "badges of fraud" to show actual intent to defraud or hinder present or future creditors. [McKinney's Debtor and Creditor Law § 276](#); [McKinney's CPLR 3016\(b\)](#). [Uni-Rty Corp. v. New York Guangdong Finance, Inc.](#), 117 A.D.3d 427, 985 N.Y.S.2d 487 (1st Dep't 2014).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [In re Shore](#), 305 B.R. 559 (Bankr. D. Kan. 2004), *aff'd*, 317 B.R. 536 (B.A.P. 10th Cir. 2004) (applying Kansas law).
- 2 [Scantek Medical, Inc. v. Sabella](#), 583 F. Supp. 2d 477 (S.D. N.Y. 2008) (applying New York law).
- 3 [In re Montagne](#), 417 B.R. 232 (Bankr. D. Vt. 2009) (applying Vermont law); [LR Development Co. LLC v. C.I.R., T.C. Memo. 2010-203, T.C.M. \(RIA\) P 2010-203 \(2010\)](#) (applying Illinois law); [Blood v. Nofzinger](#), 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 4 [Mejia v. Ruiz](#), 985 So. 2d 1109 (Fla. 3d DCA 2008); [Ellen Equipment Corp. v. C.V. Consultants & Associates, Inc.](#), 144 N.M. 55, 2008-NMCA-057, 183 P.3d 940 (Ct. App. 2008); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 [Jecker v. Hidden Valley, Inc.](#), 422 N.J. Super. 155, 27 A.3d 964 (App. Div. 2011), certification denied, 210 N.J. 28, 40 A.3d 58 (2012); [Gevedon v. Ivey](#), 172 Ohio App. 3d 567, 2007-Ohio-2970, 876 N.E.2d 604 (2d Dist. Montgomery County 2007).  
The trier of fact considers the evidence as a whole and in context to determine whether badges of fraud taken together constitute a pattern of fraudulent intent. [Klinker v. First Merchants Bank, N.A.](#), 964 N.E.2d 190 (Ind. 2012).
- 6 [Premier Financial Services v. Citibank \(Arizona\)](#), 185 Ariz. 80, 912 P.2d 1309 (Ct. App. Div. 1 1995) (requiring clear evidence of such).
- 7 [Premier Financial Services v. Citibank \(Arizona\)](#), 185 Ariz. 80, 912 P.2d 1309 (Ct. App. Div. 1 1995).
- 8 [Eli's, Inc. v. Lemen](#), 256 Neb. 515, 591 N.W.2d 543 (1999).



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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 13

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### C. Indicia or Badges of Fraud

### § 13. Effect of badge of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  16

Badges of fraud do not establish fraud per se<sup>1</sup> but merely afford grounds for such an inference or conclusion.<sup>2</sup> In some states, the court may consider the transferor or transferee's good faith to negate this inference<sup>3</sup> although not all states follow this rule.<sup>4</sup> Furthermore, the mere presence of badges of fraud may not invalidate a transaction<sup>5</sup> although they are red flags.<sup>6</sup> Certainly, a badge of fraud standing alone may amount to little more than a suspicious circumstance, insufficient in itself to constitute fraud per se.<sup>7</sup> Moreover, no single factor, among the possible badges of fraud, is determinative of fraudulent intent, and there is no set formula or threshold number of factors that warrant a finding of fraudulent intent.<sup>8</sup>

#### Practice Tip:

Once a party alleging a fraudulent transfer demonstrates a sufficient number of "badges of fraud," the burden of proof shifts to the defendant to prove that the transfer was not fraudulent in some states,<sup>9</sup> but other states do not follow this burden shifting rule.<sup>10</sup>

Footnotes

- 1 [Tonnelier Const. Group, Inc. v. Shema](#), 48 So. 3d 163 (Fla. 1st DCA 2010); [Blood v. Nofzinger](#), 162 Ohio App. 3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist. Huron County 2005).
- 2 [In re Jarvar](#), 430 B.R. 607 (Bankr. D. Mont. 2010) (applying Montana law).
- 3 [U.S. v. McCombs](#), 928 F. Supp. 261 (W.D. N.Y. 1995) (applying New York law).
- 4 [Interpool Ltd. v. Patterson](#), 890 F. Supp. 259 (S.D. N.Y. 1995) (applying Florida law).
- 5 [Sylvester v. Sylvester](#), 723 P.2d 1253 (Alaska 1986).
- 6 [In re Shore](#), 305 B.R. 559 (Bankr. D. Kan. 2004), [aff'd](#), 317 B.R. 536 (B.A.P. 10th Cir. 2004) (applying Kansas law).
- 7 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [Tonnelier Const. Group, Inc. v. Shema](#), 48 So. 3d 163 (Fla. 1st DCA 2010).
- 8 [Klinker v. First Merchants Bank, N.A.](#), 964 N.E.2d 190 (Ind. 2012).
- 9 [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), [appeal dismissed in part](#), 2012 WL 748573 (D. Md. 2012) and [aff'd](#), 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Lexington Oil and Gas Ltd., Co.](#), 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 10 [Prairie Lakes Health Care System, Inc. v. Wookey](#), 1998 SD 99, 583 N.W.2d 405 (S.D. 1998).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 14

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### C. Indicia or Badges of Fraud

### § 14. Examples of badges of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  15

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 84](#) (Complaint, petition or declaration—Transfer through dummy grantee to transferor's spouse with intent to defraud creditors)

Examples of "badges of fraud" include transfers of property by a debtor during the pendency or threat of third-party creditor litigation;<sup>1</sup> the insolvency<sup>2</sup> or indebtedness of the debtor<sup>3</sup> or transfers of property that render the debtor insolvent or greatly reduce his or her estate;<sup>4</sup> transfer of the debtor's entire estate<sup>5</sup> or a series of contemporaneous transactions that strip the debtor of all property available for execution;<sup>6</sup> secret, concealed, or hurried transactions that are not in the usual mode of doing business;<sup>7</sup> any transaction that is conducted in a manner differing from usual, customary, or ordinary methods;<sup>8</sup> transactions whereby the debtor retains benefits;<sup>9</sup> an interest,<sup>10</sup> control, or dominion of the property;<sup>11</sup> inadequate, little, or no consideration given in return for a transfer;<sup>12</sup> fraudulent incurrence of indebtedness after the conveyance;<sup>13</sup> and the relationship between the transferor and transferee.<sup>14</sup>

Additionally, the use of dummies or fictitious parties,<sup>15</sup> the purchaser's failure to examine or inventory the goods bought or looseness or incorrectness in determining the value of the purchased property,<sup>16</sup> the assumption of a business name for the sole purpose of receiving title to properties from the debtor where the assumed business name did not exist before the conveyance,<sup>17</sup>

the conveyance of property to a person having no apparent use for the property,<sup>18</sup> the lack of an innocent purpose for the transfer,<sup>19</sup> the general chronology of events and transactions under inquiry,<sup>20</sup> and the fact that the debtor has absconded are all considered badges of fraud.<sup>21</sup> No one factor is dispositive to a finding of fraud.<sup>22</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Common-law fraudulent conveyances are not an inducement-based fraud, but typically involve a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

An inference of fraud intent, for purposes of a fraudulent conveyance claim under New York law, can be drawn from so-called "badges of fraud," including: (1) a close relationship between the parties to the transaction; (2) a secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) the transferor's knowledge of the creditor's claim and his or her inability to pay it; (5) the use of dummies or fictitious parties; and (6) retention of control of the property by the transferor after the conveyance. [In re Application Pursuant to 28 U.S.C. Section 1782 of Okean B.V. and Logistic Solution Intern. to Take Discovery of Chadbourne & Parke LLP](#), 60 F. Supp. 3d 419 (S.D. N.Y. 2014).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 § 15.
- 2 [U.S. v. Porath](#), 764 F. Supp. 2d 883 (E.D. Mich. 2011), *aff'd*, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); [U.S. v. Stinson](#), 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law).
- 3 [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); [Parker v. Parker](#), 268 Neb. 187, 681 N.W.2d 735 (2004).
- 4 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [U.S. v. Toler](#), 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law).
- 5 [U.S. v. Toler](#), 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); [Parker v. Parker](#), 268 Neb. 187, 681 N.W.2d 735 (2004).
- 6 [In re Haddock](#), 246 B.R. 810 (Bankr. D. S.C. 2000) (applying South Carolina law); [Morgenthau v. A.J. Travis Ltd.](#), 184 Misc. 2d 835, 708 N.Y.S.2d 827 (Sup 2000).
- 7 § 16.
- 8 § 16.
- 9 [Freeland v. Enodis Corp.](#), 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [In re Jones](#), 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).
- 10 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 11 [U.S. v. Porath](#), 764 F. Supp. 2d 883 (E.D. Mich. 2011), *aff'd*, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); [U.S. v. Toler](#), 666 F.

- 12 Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 13 U.S. v. Toler, 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 14 *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).
- 15 U.S. v. Toler, 666 F. Supp. 2d 872 (S.D. Ohio 2009) (applying Ohio law); *In re Rood*, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and *aff'd*, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).
- 16 As to the effect of the parties' relationship in establishing a fraudulent conveyances, see §§ 31, 32.
- 17 *Amusement Industry, Inc. v. Midland Avenue Associates, LLC*, 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law); *In re Montalvo*, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (applying Kentucky law).
- 18 *Tindall v. H & S Homes, LLC*, 757 F. Supp. 2d 1339 (M.D. Ga. 2011) (applying Georgia law).
- 19 *Roeckl v. F.D.I.C.*, 885 P.2d 1067 (Alaska 1994).
- 20 *Carroll v. Carroll*, 78 So. 3d 332 (Miss. Ct. App. 2010), cert. denied, 78 So. 3d 906 (Miss. 2012).
- 21 *In re Holcomb Health Care Services, LLC*, 329 B.R. 622 (Bankr. M.D. Tenn. 2004) (applying Tennessee law).
- 22 *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293 (Bankr. S.D. N.Y. 1999); *Breitenstine v. Breitenstine*, 2003 WY 16, 62 P.3d 587 (Wyo. 2003).
- 23 *In re Mussa*, 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law).
- 24 *LR Development Co. LLC v. C.I.R., T.C. Memo. 2010-203, T.C.M. (RIA) P 2010-203 (2010)* (applying Illinois law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 15

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### C. Indicia or Badges of Fraud

### § 15. Transfer in anticipation of litigation or after judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [8](#), [10](#), [66](#), [162.1](#)

#### A.L.R. Library

[Conveyance as fraudulent where made in contemplation of possible liability for future tort](#), 38 A.L.R.3d 597

Although not every conveyance of property by one against whom a suit is pending can be deemed fraudulent,<sup>1</sup> one of the commonly recognized indicia of fraud is the transfer of property by a debtor in anticipation of a suit against him or her<sup>2</sup> while a suit against such debtor is pending<sup>3</sup> or while judgments are outstanding against the debtor.<sup>4</sup> This same rule has sometimes been applied to pending criminal actions,<sup>5</sup> as well as renunciations to inheritances.<sup>6</sup> Other considerations are whether a judgment has just been docketed against the transferor<sup>7</sup> and whether the transferor has failed to satisfy a judgment rendered against him or her.<sup>8</sup>

Knowledge of the purchaser at the time of the purchase that a suit was pending against the seller does not necessarily establish a fraudulent intent on the purchaser's part,<sup>9</sup> and the adverse evidentiary effect thereof may be overcome by proof that the purchaser acted in good faith and paid a valuable consideration.<sup>10</sup> Indeed, the good faith of both transferor and transferee is an indispensable component of fair consideration in determining whether a transfer during the pendency of an action for money damages is a fraudulent conveyance.<sup>11</sup>

Footnotes

- 1 In re Piccinini, 439 B.R. 100 (E.D. Mich. 2010) (applying Michigan law); Kaufmann v. Morales, 93 S.W.3d 650 (Tex. App. Houston 14th Dist. 2002).
- 2 S.E.C. v. Whitworth Energy Resources Ltd., 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law); In re Montalvo, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (applying Kentucky law); Shaffer v. Bellows, 260 P.3d 1064 (Alaska 2011); Carroll v. Carroll, 78 So. 3d 332 (Miss. Ct. App. 2010), cert. denied, 78 So. 3d 906 (Miss. 2012); Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. Ct. App. E.D. 2010), reh'g and/or transfer denied, (June 8, 2010).
- 3 Freeland v. Enodis Corp., 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); Flannigan v. Vulcan Power Group, L.L.C., 712 F. Supp. 2d 63 (S.D. N.Y. 2010) (applying New York law); In re Rood, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); In re Jones, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); Deyeso v. Humbert, 76 Mass. App. Ct. 1115, 922 N.E.2d 181 (2010); Fox Rest Associates, L.P. v. Little, 282 Va. 277, 717 S.E.2d 126 (2011).
- 4 Matter of Reininger-Bone, 79 B.R. 53 (Bankr. M.D. Fla. 1987).
- 5 In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 6 § 52.
- 7 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 8 Palestine Monetary Authority v. Strachman, 62 A.D.3d 213, 873 N.Y.S.2d 281, 68 U.C.C. Rep. Serv. 2d 102 (1st Dep't 2009).
- 9 In re Van Vleck, 211 B.R. 689 (Bankr. E.D. Mo. 1997).
- 10 McCrary v. Bobenhausen, 366 So. 2d 77 (Fla. 1st DCA 1978).
- 11 Mega Personal Lines, Inc. v. Halton, 9 A.D.3d 553, 780 N.Y.S.2d 409 (3d Dep't 2004).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 16

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### II. Elements, Factors, and Requisites

#### C. Indicia or Badges of Fraud

## § 16. Secrecy; transactions not in usual course of doing business

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8, 9, 15

Fraud may be inferred from unusual<sup>1</sup> and unexplained transactions,<sup>2</sup> or secret, concealed, or hasty transactions,<sup>3</sup> not in the usual mode of doing business,<sup>4</sup> as well as a debtor's conducting of business through the use of dummies or fictitious parties.<sup>5</sup> Another badge of fraud is any transaction that is conducted in a manner differing from usual, customary, or ordinary methods,<sup>6</sup> and thus, the courts look to see if there was a departure from customary methods which was inconsistent with honesty and fair dealing,<sup>7</sup> as well as comparing the transaction at hand along with usual circumstances found in bona fide transactions.<sup>8</sup>

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### Footnotes

- 1 Cendant Corp. v. Shelton, 474 F. Supp. 2d 377 (D. Conn. 2007) (applying Connecticut law); In re Bernard L. Madoff Inv. Securities LLC, 445 B.R. 206 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 2 Lawyers Title Ins. Corp. v. Dearborn Title Corp., 22 F. Supp. 2d 820 (N.D. Ill. 1998) (applying Illinois law).
- 3 Cendant Corp. v. Shelton, 474 F. Supp. 2d 377 (D. Conn. 2007) (applying Connecticut law); In re Rood, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); In re Bernard L. Madoff Inv. Securities LLC, 445 B.R. 206 (Bankr. S.D. N.Y. 2011) (applying New York law); In re Jones, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law); Dowlings, Inc. v. Homestead Dairies, Inc., 88 A.D.3d 1226, 932 N.Y.S.2d 192 (3d Dep't 2011).
- 4 Freeland v. Enodis Corp., 540 F.3d 721 (7th Cir. 2008) (applying Indiana law).
- 5 § 14.
- 6 Freeland v. Enodis Corp., 540 F.3d 721 (7th Cir. 2008) (applying Indiana law); In re Rood, 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119

(D. Md. 2012) (applying Maryland law); *In re Jones*, 397 B.R. 765 (Bankr. D. S.C. 2008) (applying South Carolina law).

7 *Bank of Brimson v. Graham*, 335 Mo. 1196, 76 S.W.2d 376, 96 A.L.R. 399 (1934).

The fact that an instrument of conveyance was not recorded is a circumstance which will be considered by the fact finder in determining fraud. *In re Thomason*, 202 B.R. 768 (Bankr. D. Colo. 1996) (applying Colorado law; assignment of partnership interest).

8 *Textron Financial Corp. v. Kruger*, 545 N.W.2d 880 (Iowa Ct. App. 1996).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 17

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### C. Indicia or Badges of Fraud

### § 17. Failure to withhold property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8, 9

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 20](#) (Complaint, petition or declaration—To set aside fraudulent transfer—Under Uniform Fraudulent Transfer Act and similar statutes—Transfer unreasonably impaired transferor's ability to pay)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 71](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Inadequacy of transferor's remaining assets)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 101](#) (Answer—Defense—Failure to bring action within statutory period after fraudulent transfer under Uniform Fraudulent Transfer Act—Response to allegation that transferor intended to incur debts beyond transferor's ability to pay as they became due)

A debtor's failure to withhold or retain sufficient property following a transfer to pay the debtor's indebtedness is one indication of a fraudulent conveyance.<sup>1</sup> If a debtor fails to withhold sufficient property to pay his or her debts, the challenging creditor need not show fraudulent intent.<sup>2</sup>

#### Practice Tip:

To survive a motion to dismiss, the plaintiff must allege that it was foreseeable at the time of a distribution that the debtor's assets would be insufficient to satisfy its liabilities.<sup>3</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Creditor's former husband's transfer of a parcel of real estate to himself and his current wife as tenants by the entirety was both actually fraudulent and constructively fraudulent within meaning of the Pennsylvania Uniform Fraudulent Transfer Act (PUFTA); at the time of the transfer, there had been an ongoing dispute regarding the amount of spousal and child support arrearages which former husband and his current wife owed creditor, transfer removed the property from creditor's reach, former husband transferred the property without receiving a reasonably equivalent value in exchange, his transfer rendered him insolvent, he either believed or should have believed that he would incur debts beyond his ability to pay, and there was still \$525,000 of equity in the property. [12 Pa.C.S.A. § 5104](#). [Klein v. Weidner](#), 729 F.3d 280 (3d Cir. 2013).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Cordes & Co., LLC v. Mitchell Companies, LLC](#), 605 F. Supp. 2d 1015 (N.D. Ill. 2009) (applying Illinois law); [Apollo Real Estate Investment Fund, IV, L.P. v. Gelber](#), 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010); [Albertson v. Robinson](#), 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006).
- 2 [Mathis v. Burton](#), 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995).
- 3 [MSKP Oak Grove, LLC v. Venuto](#), 2012 WL 2369353 (D.N.J. 2012).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II D Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.


#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

[Topic Summary](#) | [Correlation Table](#)


### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 57(4), 61, 62, 202, 203, 271.3, 273, 277(1), 308(3)

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 57(4), 61, 62, 202, 203, 271.3, 273, 277(1), 308(3)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 18

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

### § 18. Effect of insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(3), 61, 62, 277(1)

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 39, 73](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Insolvency of defendant transferor)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 64](#) (Complaint—To set aside fraudulent transfer—Under Uniform Fraudulent Transfer Act and similar statutes—Inadequacy of transferor's remaining assets—Transferred real property)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 72](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Inability to pay debts as they become due)

A transfer is fraudulent if the debtor conveyed property without receiving a fair consideration and was insolvent<sup>1</sup> at the time of the transfer or would be made so by the transfer.<sup>2</sup> This is known as a constructively fraudulent transfer,<sup>3</sup> and it is established without regard to intent.<sup>4</sup> Indeed, in such a case, neither the intent of the debtor nor knowledge of the transferee need be proven<sup>5</sup> as it is constructively established by the debtor being insolvent at the time of the transfer or being rendered insolvent thereby.<sup>6</sup> Generally, the challenging party must show, in addition to establishing insolvency, that the transferor did not receive a fair consideration for the transfer.<sup>7</sup> Furthermore, the showing of insolvency must establish the debtor's condition at the time of transfer, and it will not suffice to show that the transferor was insolvent or was thereby rendered insolvent at some subsequent

time.<sup>8</sup> A person is insolvent at the time of the fraudulent transfer if the assets are less than the amount required to pay the person's probable liability on existing debts as they become absolute and matured.<sup>9</sup>

If actual intent to defraud is found, the debtor's solvency is immaterial to the determination of whether a transfer can be set aside as fraudulent.<sup>10</sup> However, the debtor's solvency is one badge of fraud that may be considered in deciding whether actual intent to defraud exists.<sup>11</sup>

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#### Footnotes

- 1 [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law); [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); [Arvest Bank v. Byrd](#), 814 F. Supp. 2d 775 (W.D. Tenn. 2011) (applying Tennessee law); [Hawk v. C.I.R.](#), T.C. Memo. 2012-259, T.C.M. (RIA) P 2012-259 (2012) (applying Tennessee law); [Zanani v. Meisels](#), 78 A.D.3d 823, 910 N.Y.S.2d 533 (2d Dep't 2010).  
As to insolvency, generally, see [Am. Jur. 2d, Insolvency §§ 1 et seq.](#)
- 2 [Kipperman v. Onex Corp.](#), 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law); [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); [In re Carr & Porter, LLC](#), 416 B.R. 239 (Bankr. E.D. Va. 2009), decision aff'd, 416 B.R. 264 (E.D. Va. 2009) (applying Virginia law); [Mejia v. Reed](#), 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011); [Douglas v. Hill](#), 148 Wash. App. 760, 199 P.3d 493 (Div. 1 2009).
- 3 [In re Rood](#), 459 B.R. 581 (Bankr. D. Md. 2011), appeal dismissed in part, 2012 WL 748573 (D. Md. 2012) and aff'd, 2012 WL 4517119 (D. Md. 2012) (applying Maryland law); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011); [In re Estate of Steele](#), 85 A.D.3d 1375, 925 N.Y.S.2d 250 (3d Dep't 2011); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 [Cresho v. Cresho](#), 97 Ohio App. 3d 5, 646 N.E.2d 183 (11th Dist. Ashtabula County 1994).
- 6 [Matter of Tabala](#), 11 B.R. 405 (Bankr. S.D. N.Y. 1981) (applying New York law).
- 7 [Pat Clark Sports, Inc. v. Champion Trailers, Inc.](#), 487 F. Supp. 2d 1172 (D. Nev. 2007) (applying Nevada law); [Mills v. Everest Reinsurance Co.](#), 623 F. Supp. 2d 447 (S.D. N.Y. 2009), opinion adhered to on reconsideration, 2009 WL 7742508 (S.D. N.Y. 2009) (applying New York law); [Murin v. Estate of Schwalen](#), 31 A.D.3d 1031, 819 N.Y.S.2d 341 (3d Dep't 2006).  
As to consideration for a transfer, see §§ 25 to 30.
- 8 [In re Le Cafe Creme, Ltd.](#), 244 B.R. 221 (Bankr. S.D. N.Y. 2000) (applying New York law).
- 9 [Molovinsky v. Fair Employment Council of Greater Washington, Inc.](#), 154 Md. App. 262, 839 A.2d 755 (2003).
- 10 [In re Lexington Oil and Gas Ltd., Co.](#), 423 B.R. 353 (Bankr. E.D. Okla. 2010) (applying Oklahoma law).
- 11 [Kaisha v. Dodson](#), 423 B.R. 888 (N.D. Cal. 2010) (applying California law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 19

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

## § 19. Tests for determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 57(4), 61, 62

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 123 to 125](#) (Jury instructions—Definitions of "solvency" and "insolvency")

The Uniform Fraudulent Transfer Act defines "insolvency" as follows:<sup>1</sup>

- (a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.
- (b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.
- (c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.
- (d) Assets included in this calculation do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable.



Under the Uniform Fraudulent Conveyance Act, which is still in effect in some jurisdictions, a person is insolvent when the present fair salable value of his or her assets is less than the amount that will be required to pay the probable liability on the debtor's existing debts as they become absolute and matured.<sup>2</sup>

Additionally, poor financial condition for purposes of establishing a fraudulent conveyance is generally found where a person's debts or liabilities exceed his or her assets<sup>3</sup> or where a person will be left with unreasonably small capital after the transfers<sup>4</sup> or believes that he or she will be unable to pay future debts as they became due as the result of the transfers.<sup>5</sup>

Insolvency may be measured not merely at the time of the transfer<sup>6</sup> but also at the time the plaintiff seeks to collect the amount due.<sup>7</sup>

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#### Footnotes

- 1 [Unif. Fraudulent Transfer Act § 2](#) (noting that debts included in this rule do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset).
- 2 [Unif. Fraudulent Conveyance Act § 2\(1\)](#) (also including special rules for determining partnership insolvency in § 2(2)).
- 3 [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law); [In re Norstan Apparel Shops, Inc.](#), 367 B.R. 68 (Bankr. E.D. N.Y. 2007) (applying New York law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 4 [Kipperman v. Onex Corp.](#), 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law); [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 5 [In re Hydrogen, L.L.C.](#), 431 B.R. 337 (Bankr. S.D. N.Y. 2010) (applying New York law); [In re Stanley](#), 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); [In re Mastro](#), 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).  
In determining whether a transfer was made with the actual intent to hinder, delay, or defraud any creditor, consideration may be given to whether the debtor was insolvent or became insolvent shortly after the transfer was made, or the obligation was incurred. [Unif. Fraudulent Transfer Act § 4\(b\)\(9\)](#); [Unif. Fraudulent Conveyance Act § 4](#).
- 6 [Future Group, II v. Nationsbank](#), 324 S.C. 89, 478 S.E.2d 45 (1996).
- 7 [Future Group, II v. Nationsbank](#), 324 S.C. 89, 478 S.E.2d 45 (1996).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 20

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

## § 20. Procedure in determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1), 308(3)

A determination of insolvency is a question of fact,<sup>1</sup> and the determination looks to the debtor's present ability to pay debts.<sup>2</sup> In some states, this process requires the court to recreate the financial condition of the debtor at the time the challenged transfer took place.<sup>3</sup> It also requires the court to make an appraisal of probable liability versus the debtor's value of assets,<sup>4</sup> which is made as to debts that are in existence when the conveyance is made.<sup>5</sup> In finding a constructive fraudulent conveyance, some courts have found that as an alternative to showing insolvency, the plaintiff may show that the property remaining after the questionable conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they become mature.<sup>6</sup> Elsewhere, the courts ask if the transferor is able to sell its assets at arm's length in market sales and pay its liabilities, including probable liability, on contingent debts,<sup>7</sup> which involves valuing the debtor's assets as if the assets were individually sold with reasonable promptness in arm's length transactions in the existing and not theoretical market at the time the obligation was incurred.<sup>8</sup>

Under one approach, the debtor is "insolvent" if he or she is insolvent on a balance-sheet basis,<sup>9</sup> and under the balance-sheet approach, the debtor is insolvent if the sum of his or her liabilities exceed the sum of his or her assets at fair valuation,<sup>10</sup> excluding any property transferred, concealed, or removed with intent to hinder, delay, or defraud creditors.<sup>11</sup> Although the courts will consider unaudited balance sheets, expert testimony, and appraisals in calculating the "fair present salable value" of a transferor's assets to determine insolvency,<sup>12</sup> only assets with a present salable value are taken into consideration in determining insolvency; claims that are inchoate, uncertain, and contested have no present value and cannot be considered an asset of the company.<sup>13</sup> For fraudulent conveyance purposes, a conveyance will be voided when the fair value of the salable assets is less than the amount required to pay existing debts as they become due as in that case, the debtor is considered "insolvent."<sup>14</sup>

Footnotes

- 1 Gillespie v. Sand-Rock Transit, Inc., 292 Ga. App. 661, 665 S.E.2d 385 (2008); Joslin v. Lopez, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dep't 2003).
- 2 U.S. v. St. Mary, 334 F. Supp. 799 (E.D. Pa. 1971) (applying Pennsylvania law).
- 3 In re Pajaro Dunes Rental Agency, Inc., 174 B.R. 557 (Bankr. N.D. Cal. 1994) (applying California law); CB Richard Ellis, Inc. v. CLGP, LLC, 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 4 Patterson v. Missler, 238 Cal. App. 2d 759, 48 Cal. Rptr. 215 (4th Dist. 1965).
- 5 Nimick v. Shutty, 440 Pa. Super. 87, 655 A.2d 132 (1995); Crocker v. Ryan, 914 S.W.2d 551 (Tenn. Ct. App. 1995); Hudson v. Hudson, 249 Va. 335, 455 S.E.2d 14 (1995).
- 6 In re Flutie New York Corp., 310 B.R. 31 (Bankr. S.D. N.Y. 2004) (applying New York law).
- 7 In re Morse Tool, Inc., 148 B.R. 97 (Bankr. D. Mass. 1992) (applying Massachusetts law); In re Consolidated Capital Equities Corp., 175 B.R. 629 (Bankr. N.D. Tex. 1994) (applying California law).
- 8 In re Consolidated Capital Equities Corp., 143 B.R. 80 (Bankr. N.D. Tex. 1992) (applying California law).
- 9 In re Nirvana Restaurant Inc., 337 B.R. 495 (Bankr. S.D. N.Y. 2006) (applying New York law); In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law).  
A state's Uniform Fraudulent Transfer Act's definition of "insolvency" mirrors the balance-sheet test for insolvency under the Bankruptcy Code. In re Zeigler, 320 B.R. 362 (Bankr. N.D. Ill. 2005) (applying Illinois law).
- 10 In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 11 In re Canyon Systems Corp., 343 B.R. 615 (Bankr. S.D. Ohio 2006) (applying Ohio law).
- 12 In re Otis & Edwards, P.C., 115 B.R. 900 (Bankr. E.D. Mich. 1990).
- 13 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).  
Book value nevertheless provides some evidence of the debtor's solvency. In re Nirvana Restaurant Inc., 337 B.R. 495 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 14 Hanigan v. Trumble, 252 Neb. 376, 562 N.W.2d 526 (1997).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 21

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

### § 21. Factors in determining insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1)

In making an insolvency determination, the courts consider the type of asset involved,<sup>1</sup> and in the event the debtor's entire nonexempt property and assets are insufficient to pay his or her debts, the debtor is considered to be "insolvent."<sup>2</sup> Interests which are inchoate, uncertain, and contested lack a present fair salable value, have no present value, and cannot be considered assets.<sup>3</sup> Unliquidated assets are also not considered,<sup>4</sup> but contingent liabilities are considered,<sup>5</sup> it matters not, when determining whether a debt counts for purposes of insolvency testing, that such debt (a) has not yet been reduced to judgment, (b) is still unliquidated, or (c) is subject to a genuine dispute.<sup>6</sup> Additionally, contingent claims are considered in a solvency analysis under a state's Uniform Fraudulent Transfer Act only if there is a likelihood, as of the date solvency is being measured, that the contingency will occur.<sup>7</sup> Contingent liabilities may be included in an insolvency analysis only in proportion to the likelihood that the obligation will be required to be satisfied.<sup>8</sup>

#### Observation:

Although few courts have established bright line tests for determining insolvency, some courts have observed that a useful guideline by which a court may evaluate the fairness of a transfer and determine a "reasonably equivalent value" is to ask whether the value that the debtor received represents at least 70% of the market value of the property transferred.<sup>9</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

In determining a debtor's solvency under the Bankruptcy Code or the Illinois Uniform Fraudulent Transfer Act (IUFTA), the fair market value of property must be measured by what the property would bring if actually sold on the market at the time of the transfer, assuming an informed, hypothetical willing seller and an informed, hypothetical willing buyer not under compulsion to buy or sell, and having a reasonable amount of time to sell the property. [11 U.S.C.A. § 101\(32\)](#); S.H.A. [740 ILCS 160/3\(a\)](#). [In re Doctors Hosp. of Hyde Park, Inc.](#), 507 B.R. 558 (Bankr. N.D. Ill. 2013).

### [END OF SUPPLEMENT]

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### Footnotes

- 1 [Leibowitz v. Parkway Bank and Trust Co.](#), 210 B.R. 298 (N.D. Ill. 1997), [aff'd](#), 139 F.3d 574 (7th Cir. 1998) (applying Illinois law).
- 2 [Tolle v. Fenley](#), 2006 UT App 78, 132 P.3d 63 (Utah Ct. App. 2006).
- 3 [First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc.](#), 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 4 [In re Otis & Edwards, P.C.](#), 115 B.R. 900 (Bankr. E.D. Mich. 1990).
- 5 [In re Davis](#), 148 B.R. 165 (Bankr. E.D. N.Y. 1992), [opinion aff'd](#), 169 B.R. 285 (E.D. N.Y. 1994) (applying New York law); [LR Development Co. LLC v. C.I.R.](#), T.C. Memo. 2010-203, T.C.M. (RIA) P 2010-203 (2010) (applying Illinois law).
- 6 [In re Arbogast](#), 466 B.R. 287 (Bankr. W.D. Pa. 2012), [aff'd](#), 479 B.R. 661 (W.D. Pa. 2012) (applying Pennsylvania law).
- 7 [Hullett v. Cousin](#), 204 Ariz. 292, 63 P.3d 1029 (2003).
- 8 [In re Tri-Valley Distributing, Inc.](#), 452 B.R. 837 (Bankr. D. Utah 2011) (applying Utah law).
- 9 [In re Goldberg](#), 229 B.R. 877 (Bankr. S.D. Fla. 1998).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 22

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

## § 22. Determining insolvency for businesses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(1)

In terms of corporate debtors, if the corporation does not have significant capital assets to offset working capital deficits, it is insolvent.<sup>1</sup> The accepted test for determining unreasonably small capital, in the constructively fraudulent conveyance context, is reasonable foreseeability.<sup>2</sup> Stated another way, if the debtor received less than the reasonably equivalent value for a transfer and was either left with an unreasonably small amount of assets to carry on its business or else it intended to or it should have foreseen that it would incur debts beyond its ability to pay as they became due, the transfer is fraudulent and may be voided.<sup>3</sup> A transaction leaves a company with unreasonably small capital, for purposes of a constructively fraudulent transfer, when it creates an unreasonable risk of insolvency, not necessarily a likelihood of insolvency.<sup>4</sup> Like individuals, a corporation's solvency should be assessed as of the time of the alleged fraudulent conveyance.<sup>5</sup> In assessing a corporation's adequate capital, the test is reasonable foreseeability of insolvency,<sup>6</sup> as well as the reasonableness of the debtor's cash flow projections,<sup>7</sup> given the circumstances on the date of the transfer.<sup>8</sup> The test for whether a challenged transaction has left a company with inadequate capital to fund its operations is not the same as the test for insolvency; "unreasonably small capital" is something other than insolvency or inability to pay one's debts as they come due.<sup>9</sup> In order to determine whether a debtor is operating with inadequate capital, a court must look at the debtor's debt to equity ratio, its historical capital cushion, and the need for working capital in the specific industry at issue; when assessing whether a company's projections are reasonable, courts may look to expert analysis by investment bankers and independent accounting firms which affirm management's projections but should also recognize that a powerful indication of contemporary, informed opinion as to value comes from private investors who with their finances and time at stake, and with access to substantial professional expertise, conclude at the time that the business was indeed one that could be profitably pursued, and the court may also consider the ability of a debtor to obtain financing in determining its financial condition.<sup>10</sup> However, it has also been said that whether a transfer was fraudulent when made depends on conditions that existed when it was made, not on what happened later to affect the timing of the company's collapse.<sup>11</sup> The court must analyze whether the parties' projections were reasonable not with the benefit of hindsight but based upon whether they were

prudent when made.<sup>12</sup> Nevertheless, the length of the interval between a leveraged buyout and a company's collapse is pertinent to determining the effect of the transfer. The longer the interval, the less likely that the collapse was fated although 10 or 12 months is not necessarily a long enough interval to create a presumption that the terms of the buyout were not responsible for the company's failure.<sup>13</sup>

Insolvency can also be defined by the measure of liabilities against enterprise worth.<sup>14</sup>

Liabilities must be reduced to their present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities.<sup>15</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

"Cash flow" test for whether a transfer made for less than reasonably equivalent value is avoidable as constructively fraudulent to creditors, on ground that debtor, while not insolvent at time of a transfer, intended to or believed that it would incur debts that would not cash flow, looks to whether debtor intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as they matured. 11 U.S.C.A. § 548(a)(1)(B)(ii)(III). *In re Opus East, LLC*, 528 B.R. 30 (Bankr. D. Del. 2015).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Telefest, Inc. v. VU-TV, Inc.](#), 591 F. Supp. 1368 (D.N.J. 1984) (applying New Jersey law).
- 2 [In re Bachrach Clothing, Inc.](#), 2012 WL 4838998 (Bankr. N.D. Ill. 2012) (applying Illinois law).
- 3 [In re Bankest Capital Corp.](#), 374 B.R. 333 (Bankr. S.D. Fla. 2007) (applying Florida law); [Starnes v. C.I.R.](#), T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina's UFTA law); [Kirkeby v. Superior Court of Orange County](#), 33 Cal. 4th 642, 15 Cal. Rptr. 3d 805, 93 P.3d 395 (2004).
- 4 [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).
- 5 [Crepeau v. Gronager](#), 41 Conn. App. 302, 675 A.2d 1361 (1996).
- 6 [In re Bergman](#), 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (applying New York's UFCA); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).
- 7 [In re Bergman](#), 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (applying New York's UFCA and including the reasonable of the projections of sales, profit margins, and net profits and losses, including difficulties that are likely to arise); [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011).
- 8 [In re WCC Holding Corp.](#), 171 B.R. 972 (Bankr. N.D. Tex. 1994).
- 9 [In re Joy Recovery Technology Corp.](#), 286 B.R. 54 (Bankr. N.D. Ill. 2002) (applying Illinois law).
- 10 [Kipperman v. Onex Corp.](#), 411 B.R. 805 (N.D. Ga. 2009), reconsideration denied in part, 2010 WL 761227 (N.D. Ga. 2010) (applying Georgia law).
- 11 [Boyer v. Crown Stock Distribution, Inc.](#), 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).
- 12 [In re Fidelity Bond and Mortg. Co.](#), 340 B.R. 266 (Bankr. E.D. Pa. 2006), order aff'd, 371 B.R. 708 (E.D. Pa. 2007) (applying Pennsylvania law).
- 13 [Boyer v. Crown Stock Distribution, Inc.](#), 587 F.3d 787 (7th Cir. 2009) (applying Indiana law).

- 14                    [In re Bachrach Clothing, Inc.](#), 2012 WL 4838998 (Bankr. N.D. Ill. 2012) (applying Illinois law).
- 15                    [CB Richard Ellis, Inc. v. CLGP, LLC](#), 251 P.3d 523 (Colo. App. 2010), cert. denied, 2011 WL 882761 (Colo. 2011) (applying the state's UFTA).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 23

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

### § 23. Effect of insolvency or indebtedness

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57, 202, 203

A fraudulent conveyance is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid and can be enforced in all of its terms as any other contract.<sup>1</sup> However, it has also been held that, although a fraudulent transfer is voidable, a good faith transferee is entitled to a lien on the asset transferred up to the value given to the debtor for the transfer.<sup>2</sup> As to creditors, a good faith creditor that obtained for value a security interest in property that had been fraudulently conveyed has priority over a prior unsecured creditor that later obtained a judgment lien against the property pursuant to the Uniform Fraudulent Transfer Act. The fraudulent conveyance was not void but merely voidable from its inception, the unsecured creditor had no lien on the property when the good faith creditor perfected its interest, and thus, the good faith creditor obtained a valid prior interest in the property even if the transfer was later determined to be fraudulent and void.<sup>3</sup> The fact that a debtor is insolvent is not grounds for setting aside a conveyance made for a valuable consideration and without intent to defraud, hinder, or delay creditors.<sup>4</sup> Consequently, the owner of property, although he or she is greatly indebted or even insolvent, may sell it and give good title to a bona fide purchaser, despite the seller's creditors, up to the time when they shall have acquired a lien.<sup>5</sup> However, the converse is also true; no conveyance may be adjudged fraudulent against creditors without proof that the transferor was insolvent at the time of the transfer or was rendered insolvent thereby.<sup>6</sup> Furthermore, some courts hold that a fraudulent conveyance is established where a debtor was insolvent at the time of a transfer or would be made insolvent by the challenged transfer, and if the transfer was made without fair consideration, neither intent on the part of the debtor nor knowledge of the transferee need be proven.<sup>7</sup> In that case, the law of fraudulent conveyances does not require a showing of actual fraudulent intent so long as the elements of constructive fraud are present.<sup>8</sup>

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#### Footnotes

1                   Hair v. Schellenberger, 966 N.E.2d 693 (Ind. Ct. App. 2012), transfer denied, 975 N.E.2d 360 (Ind. 2012).  
2                   Carbon v. Spokane Closing and Escrow, Inc., 135 Wash. App. 870, 147 P.3d 605 (Div. 3 2006).  
3                   Associates Housing Finance L.L.C. v. Stredwick, 120 Wash. App. 52, 83 P.3d 1032 (Div. 3 2004) (applying  
4                   Washington's UFTA).  
5                   Vazquez v. Santisteban, 334 So. 2d 97 (Fla. 3d DCA 1976).  
6                   Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (overruled on other grounds by, Duke City Lumber  
7                   Co., Inc. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975)).  
8                   Yetter Well Service, Inc. v. Cimarron Oil Co., Inc., 841 P.2d 1068 (Colo. App. 1992).  
                  Cresho v. Cresho, 97 Ohio App. 3d 5, 646 N.E.2d 183 (11th Dist. Ashtabula County 1994).  
                  McCall Stock Farms, Inc. v. U.S., 14 F.3d 1562 (Fed. Cir. 1993).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 24

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### D. Financial Condition of Transferor

## § 24. Effect of insolvency or indebtedness—Presumption of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  271.3, 273

### A.L.R. Library

[Assumption of Mortgage on Real Property as Consideration for Conveyance That Is Attacked as Fraudulent](#), 15 A.L.R.6th 241

### Trial Strategy

[Avoidance and Recovery of Fraudulent Transfers](#), 25 Am. Jur. Proof of Facts 3d 591  
[Conveyance With Intent to Defraud Creditors](#), 5 Am. Jur. Proof of Facts 2d 697

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 118](#) (Jury instructions—Definition of reasonably equivalent value)

To establish fraud in law or constructive fraud for purposes of a fraudulent conveyance, a showing of fraudulent intent is not required; rather, fraud is presumed if the debtor transfers property for less than adequate value and is thereby unable to meet his or her obligations.<sup>1</sup> If a debtor is actually insolvent, he or she cannot alienate property and place it in a position where it is not subject to process on behalf of his or her creditors unless the debtor has received a full and fair consideration for the property transferred,<sup>2</sup> and the transfer has been made in good faith.<sup>3</sup>

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#### Footnotes

- 1 [In re Knippen](#), 355 B.R. 710 (Bankr. N.D. Ill. 2006), judgment aff'd, 2007 WL 1498906 (N.D. Ill. 2007) (construing Illinois' UFTA); [Apollo Real Estate Investment Fund, IV, L.P. v. Gelber](#), 403 Ill. App. 3d 179, 343 Ill. Dec. 735, 935 N.E.2d 963 (1st Dist. 2010), appeal denied, 238 Ill. 2d 647, 347 Ill. Dec. 249, 942 N.E.2d 452 (2010).  
As to the consideration for a transfer, see §§ 25 to 30.
- 2 [Dupree v. Quinn](#), 290 S.W.2d 329 (Tex. Civ. App. Texarkana 1956), judgment rev'd on other grounds, 157 Tex. 441, 303 S.W.2d 769 (1957).
- 3 [Hall v. Feeney](#), 22 S.D. 541, 118 N.W. 1038 (1908).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II E Refs.

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 77, 84, 86, 87

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  73 to 77, 84, 86, 87

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 25

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

### § 25. Fair consideration and reasonably equivalent value defined

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 76

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 117, 118](#) (Jury instructions—Definition of "value" and "reasonably equivalent value")

A determination of "fair consideration"<sup>1</sup> or "reasonably equivalent value"<sup>2</sup> is one which disregards the form of the transaction and looks instead to its substance and is fact sensitive.<sup>3</sup> The Uniform Fraudulent Transfer Act speaks of the type of consideration that is required to avoid fraud as being a reasonably equivalent value.<sup>4</sup> Whether a debtor received reasonably equivalent value is a question of fact that is based upon the facts and circumstances of each particular case.<sup>5</sup> The Uniform Fraudulent Conveyance Act defines fair consideration as a fair equivalent for the property or obligation received in a good faith transfer.<sup>6</sup> Most courts have agreed with this approach<sup>7</sup> although others have discussed payment of a "substantial consideration,"<sup>8</sup> a "valuable consideration,"<sup>9</sup> and an "inadequate consideration."<sup>10</sup> What constitutes a fair consideration or reasonably equivalent value is determined on a case-by-case basis<sup>11</sup> based on the facts and circumstances of each particular case<sup>12</sup> and must be determined from the standpoint of creditors.<sup>13</sup> Some courts make the determination on the date of the transfer or the time of the transaction.<sup>14</sup>

**Distinction:**

The Uniform Fraudulent Transfer Act specifically enumerates badges of fraud while the Uniform Fraudulent Conveyance Act looks to common law; the UFTA requires lack of "reasonably equivalent value" as an element of constructive fraudulent transfer while the UFCA requires an absence of "fair consideration," defined as requiring both "fair equivalent" value and "good faith."<sup>15</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

In strong-arm proceeding to avoid, as constructively fraudulent transfers, direct deposit of Chapter 7 debtor's wages into entireties account that he shared with his non-debtor wife, bankruptcy court did not clearly err in finding that debtor's wages were source of funds that remained in entireties and in another account at time of debtor's bankruptcy filing, and that debtor failed to receive "reasonably equivalent value" therefor, given lack of evidence as to how funds were ultimately spent. 11 U.S.C.A. § 544; 12 Pa.C.S.A. §§ 5104(a)(2)(ii), 5105. *In re Wettach*, 811 F.3d 99 (3d Cir. 2016).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 HBE Leasing Corp. v. Frank, 48 F.3d 623, 31 Fed. R. Serv. 3d 1422 (2d Cir. 1995) (applying New York law).
- 2 *In re Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005) (applying Illinois law).
- 3 R.L. Friedland Realty, Inc. v. Mitlin Equities Corp., 136 Misc. 2d 750, 519 N.Y.S.2d 170 (City Ct. 1987).
- 4 Unif. Fraudulent Transfer Act § 4(a)(2).
- 5 *In re Michigan Machine Tool Control Corp.*, 381 B.R. 657 (Bankr. E.D. Mich. 2008) (applying Michigan law); *Hawk v. C.I.R.*, T.C. Memo. 2012-259, T.C.M. (RIA) P 2012-259 (2012) (applying Tennessee law); *Starnes v. C.I.R.*, T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law).
- 6 Unif. Fraudulent Conveyance Act § 3.
- 7 *Voeist-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 732 F. Supp. 1315 (E.D. Pa. 1989), order aff'd in part, rev'd in part on other grounds, 919 F.2d 206 (3d Cir. 1990).
- 8 *Greystone Community Reinvestment Ass'n, Inc. v. Berean Capital, Inc.*, 638 F. Supp. 2d 278 (D. Conn. 2009) (applying Connecticut law); *Abbott Terrace Health Center, Inc. v. Parawich*, 120 Conn. App. 78, 990 A.2d 1267 (2010).
- 9 *In re Ducate*, 355 B.R. 536 (Bankr. D. S.C. 2006) (applying South Carolina law); *Albertson v. Robinson*, 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006); *Fox Rest Associates, L.P. v. Little*, 282 Va. 277, 717 S.E.2d 126 (2011).

- 10 Cordes & Co., LLC v. Mitchell Companies, LLC, 605 F. Supp. 2d 1015 (N.D. Ill. 2009) (applying Illinois law); U.S. v. Stinson, 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law); Shaffer v. Bellows, 260 P.3d 1064 (Alaska 2011); Klinker v. First Merchants Bank, N.A., 964 N.E.2d 190 (Ind. 2012).
- 11 Lippe v. Bairnco Corp., 249 F. Supp. 2d 357 (S.D. N.Y. 2003), judgment aff'd, 99 Fed. Appx. 274 (2d Cir. 2004) (applying New York law).
- 12 Salus Mundi Foundation v. C.I.R., T.C. Memo. 2012-61, T.C.M. (RIA) P 2012-061 (2012) (applying New York law); Starnes v. C.I.R., T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law); Commodity Futures Trading Com'n v. Walsh, 17 N.Y.3d 162, 927 N.Y.S.2d 821, 951 N.E.2d 369 (2011).
- 13 Smith v. American Founders Financial, Corp., 365 B.R. 647 (S.D. Tex. 2007) (applying Texas law); Starnes v. C.I.R., T.C. Memo. 2011-63, T.C.M. (RIA) P 2011-063 (2011), judgment aff'd, 680 F.3d 417 (4th Cir. 2012) (applying North Carolina law).
- 14 In re Calvillo, 263 B.R. 214 (W.D. Tex. 2000) (applying Texas law); In re Key3Media Group, Inc., 336 B.R. 87 (Bankr. D. Del. 2005), decision aff'd, 2006 WL 2842462 (D. Del. 2006) (applying New York law).  
Hindsight should not be utilized in deciding whether the debtor received a "reasonably equivalent value." Creditor's Committee of Jumer's Castle Lodge, Inc. v. Jumer, 472 F.3d 943 (7th Cir. 2007) (applying Illinois law).
- 15 Allstate Ins. Co. v. Countrywide Financial Corp., 842 F. Supp. 2d 1216 (C.D. Cal. 2012).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 26

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

### § 26. Effect of lack of fair consideration

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  73 to 75

The Uniform Fraudulent Transfer Act provides that a transfer is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor's finances were precarious as defined by the Act.<sup>1</sup> Similarly, the Uniform Fraudulent Conveyance Act forbids conveyances by one who is insolvent or will be rendered insolvent when the conveyance is made without a fair consideration by individuals,<sup>2</sup> persons engaged in businesses,<sup>3</sup> and persons about to incur debts beyond their ability to pay.<sup>4</sup> Lack of a fair consideration is also recognized by the courts to be a prime factor in determining whether a transaction is fraudulent.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Unif. Fraudulent Transfer Act § 4\(a\)\(2\)](#).
- <sup>2</sup> [Unif. Fraudulent Conveyance Act § 4](#).
- <sup>3</sup> [Unif. Fraudulent Conveyance Act § 5](#).
- <sup>4</sup> [Unif. Fraudulent Conveyance Act § 6](#).
- <sup>5</sup> [In re Spatz, 222 B.R. 157 \(N.D. Ill. 1998\) \(applying Illinois law\); Palmer v. Murphy, 42 Mass. App. Ct. 334, 677 N.E.2d 247 \(1997\)](#).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 27

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

### § 27. Adequacy of consideration

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76, 77

The determination of the adequacy<sup>1</sup> or fairness<sup>2</sup> of consideration is not governed by mathematical rules. There does not need to be proof of a dollar-for-dollar exchange,<sup>3</sup> nor must there be a total lack of consideration.<sup>4</sup> Similarly, the determination as to whether a debtor received "reasonably equivalent value" for a challenged transfer does not depend on a fixed mathematical formula<sup>5</sup> but is based on a comparison of the value of what was transferred to the value of what the debtor received in exchange,<sup>6</sup> with fair market value being one factor for the court to consider.<sup>7</sup>

#### Observation:

For fraudulent transfer purposes, a party does not provide "value" to an insolvent debtor by helping it conceal assets from a creditor, large or small, secured or unsecured.<sup>8</sup>

However, the courts do weigh the value of the goods sold and any direct or indirect benefits conferred as a result of a transfer,<sup>9</sup> as well as all the circumstances to determine whether there is a reasonable and fair proportion between both sides of the transfer.<sup>10</sup> Nominal consideration is insufficient to constitute fair consideration<sup>11</sup> or reasonably equivalent value,<sup>12</sup> as are promises to provide future services,<sup>13</sup> or support for the debtor or another person;<sup>14</sup> promises of love and affection;<sup>15</sup> moral obligations;<sup>16</sup> or

spiritual, emotional, psychological, or educational services.<sup>17</sup> Rather, the benefits must go beyond some speculative, ephemeral, or psychic satisfaction that might result from doing a favor for a friend.<sup>18</sup> Value must confer a direct, economic benefit upon the debtor, rather than an intangible, psychological benefit,<sup>19</sup> but it has also been held that, in the context of a constructively fraudulent conveyance, value may include any benefit, whether direct or indirect.<sup>20</sup>

Inadequacy of price does not mean an honest difference of opinion as to price but a consideration so far short of the real value of the property as to startle a correct mind or shock the moral sense.<sup>21</sup> At the very least, the debtor, not a third person,<sup>22</sup> must receive some indirect benefit from the transfer, and this benefit must be fairly concrete.<sup>23</sup> A debtor thus can receive fair consideration for a transfer indirectly, through a benefit conferred on a third party, provided that the value of the benefit received by the debtor approximates the value of the property or obligation he or she has given up, and such indirect benefits may include consideration flowing from the debtor to the guarantor, synergy, increased access to capital, safeguarding a source of supply, and protecting customer relationships, but an indirect benefit from the guarantee will not be recognized unless it is fairly concrete.<sup>24</sup> The consideration received must be something more than the consideration to support a contract,<sup>25</sup> and it must be secured or satisfied.<sup>26</sup> However, indirect benefits that cannot be quantified do not constitute "value" that would support a constructively fraudulent conveyance.<sup>27</sup>

**Observation:**

Inadequacy of consideration alone is not a badge of fraud.<sup>28</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Whether transfer is made for less than "reasonably equivalent value," as required for avoidance of transfer as constructively fraudulent to creditors under Florida law, depends on number of factors including good faith of parties, disparity between fair value of the property transferred and what debtor actually received, and whether transaction was at arm's length. [West's F.S.A. §§ 726.105\(1\)\(b\), 726.106\(1\)](#). [Welch v. Highlands Union Bank](#), 526 B.R. 152 (W.D. Va. 2015).

Whether debtor received valuable consideration, of kind sufficient to preclude avoidance of transfer as constructively fraudulent to creditors under Kentucky law, is to be determined at the time of challenged transfer. [Ky. Rev. Stat. Ann. § 378.020](#). [In re Licking River Mining, LLC](#), 603 B.R. 336 (Bankr. E.D. Ky. 2019), as amended, (July 19, 2019).

Chapter 7 debtor's use of residential mortgage property as home and dollar-for-dollar satisfaction of his legal obligation on mortgage note, not to mention the satisfaction of support obligations that debtor owed to his wife and dependent children, constituted "reasonably equivalent value," as well as "fair consideration," for debtor's monthly mortgage payments, so as to prevent avoidance, as constructively fraudulent to creditors under bankruptcy fraudulent transfer statute or New York fraudulent transfer law, either one-half of monthly mortgage payments that debtor made over the two-year period preceding petition date,

or one-half of monthly mortgage payments that debtor made over the six-year period preceding petition date. 11 U.S.C.A. §§ 544(b)(1), 548(a)(1)(B); N.Y. Debt. and Cred. Law § 273. In re Conti, 572 B.R. 73 (Bankr. W.D. N.Y. 2017).

Besides a finding of actual intent to hinder or delay a creditor, a transfer may be deemed fraudulent under the Utah Uniform Fraudulent Transfer Act (UFTA) if the transfer was made without the transferor receiving reasonably equivalent value in exchange, and the debtor's financial situation is thereafter inadequate for the business. Utah Code Ann. § 25-6-5(1)(b). In re Black Iron, LLC, 609 B.R. 390 (Bankr. D. Utah 2019).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 Interpool Ltd. v. Patterson, 890 F. Supp. 259 (S.D. N.Y. 1995) (applying Florida law); Textron Financial Corp. v. Kruger, 545 N.W.2d 880 (Iowa Ct. App. 1996).
- 2 In re Actrade Financial Technologies Ltd., 337 B.R. 791 (Bankr. S.D. N.Y. 2005) (applying New York law).
- 3 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 4 Cook v. Bieluch, 32 Conn. App. 537, 629 A.2d 1175 (1993) (overruled on other grounds by, Kaczynski v. Kaczynski, 294 Conn. 121, 981 A.2d 1068 (2009)).
- 5 In re Schneider, 417 B.R. 907 (Bankr. N.D. Ill. 2009) (applying Illinois law); In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 6 Creditor's Committee of Jumer's Castle Lodge, Inc. v. Jumer, 472 F.3d 943 (7th Cir. 2007) (applying Illinois law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298, T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 7 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 8 In re MarketXT Holdings Corp., 426 B.R. 467 (Bankr. S.D. N.Y. 2010), judgment entered, 2010 WL 2342465 (Bankr. S.D. N.Y. 2010), subsequently dismissed, 455 Fed. Appx. 41 (2d Cir. 2012).
- 9 Interpool Ltd. v. Patterson, 890 F. Supp. 259 (S.D. N.Y. 1995).
- 10 In re Fordu, 201 F.3d 693, 1999 FED App. 0425P (6th Cir. 1999) (applying Ohio law); In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 11 MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Services Co., 910 F. Supp. 913 (S.D. N.Y. 1995).
- 12 Wachovia Securities, LLC v. Neuhauser, 528 F. Supp. 2d 834 (N.D. Ill. 2007) (applying Illinois law in a constructive fraudulent conveyance context).
- 13 One Hundred Pearl Ltd. v. Vantage Securities, Inc., 887 F. Supp. 636 (S.D. N.Y. 1995) (applying New York law).
- 14 In re Carbaat, 357 B.R. 553 (Bankr. N.D. Cal. 2006) (applying California law); In re Ventimiglia, 362 B.R. 71 (Bankr. E.D. N.Y. 2007) (applying New York law).
- 15 Federal Refinance Co., Inc. v. Klock, 352 F.3d 16 (1st Cir. 2003) (applying former Massachusetts UFCA law); In re Marlar, 267 F.3d 749 (8th Cir. 2001) (applying Arkansas UFTA law; consideration of \$10 was also provided); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); Albertson v. Robinson, 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006) (consideration of \$5 was also provided).
- 16 Rubenstein v. C.I.R., 134 T.C. 266, 2010 WL 2300752 (2010) (applying Florida law); Doe v. Ewing, 205 Mich. App. 605, 517 N.W.2d 849 (1994).
- 17 In re Bloch, 207 B.R. 944 (D. Colo. 1997).
- 18 Mann v. Hanil Bank, 920 F. Supp. 944 (E.D. Wis. 1996).
- 19 In re Schaefer, 331 B.R. 401 (Bankr. N.D. Iowa 2005) (applying Iowa law).

- 20 Smith v. American Founders Financial, Corp., 365 B.R. 647 (S.D. Tex. 2007) (applying Texas law); In re  
Yellowstone Mountain Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds on  
reconsideration in part, 2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law); In re Hanson,  
373 B.R. 522 (Bankr. N.D. Ohio 2007) (applying Ohio law); In re Scheffler, 471 B.R. 464 (Bankr. E.D.  
Pa. 2012) (applying Pennsylvania law); Frank Sawyer Trust of May 1992 v. C.I.R., T.C. Memo. 2011-298,  
T.C.M. (RIA) P 2011-298 (2011) (applying Massachusetts law).
- 21 Neal v. Clark, 75 Ariz. 91, 251 P.2d 903 (1952).
- 22 National Westminster Bank N.J. v. Anders Engineering, Inc., 289 N.J. Super. 602, 674 A.2d 638 (App. Div.  
1996); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).
- 23 In re Yellowstone Mountain Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds  
on reconsideration in part, 2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law); In re Pace,  
456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).
- 24 In re Asia Global Crossing, Ltd., 344 B.R. 247 (Bankr. S.D. N.Y. 2006) (applying New York law).
- 25 In re Image Worldwide, Ltd., 139 F.3d 574 (7th Cir. 1998).
- 26 Chemical Bank v. Dana, 234 B.R. 585 (D. Conn. 1999), judgment aff'd, 2 Fed. Appx. 180 (2d Cir. 2001)  
(applying Connecticut law).
- 27 In re Solomon, 299 B.R. 626 (B.A.P. 10th Cir. 2003) (applying Oklahoma law); In re Yellowstone Mountain  
Club, LLC, 436 B.R. 598 (Bankr. D. Mont. 2010), amended on other grounds on reconsideration in part,  
2010 WL 3504210 (Bankr. D. Mont. 2010) (applying Montana law).
- 28 Diss v. Agri Business Intern., Inc., 670 N.E.2d 97 (Ind. Ct. App. 1996).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 28

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

### § 28. Adequacy of consideration—Factors for determining fair consideration or reasonably equivalent consideration, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76

#### A.L.R. Library

[Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 A.L.R.2d 500](#)

Among the circumstances considered by the courts in deciding whether the value that the debtor received for the challenged transfer was "reasonably equivalent" to what he or she gave up such that the transfer may not be avoided as constructively fraudulent to creditors are: (1) the fair market value of what the debtor received; (2) the existence of an arm's length relationship between the debtor and the transferee; and (3) the transferee's good faith.<sup>1</sup> As also stated, circumstances examined for a fair consideration determination include whether the transaction was conducted at arm's length, whether property or value was transferred to the debtor, whether the debtor received additional and valuable benefits as a result of the transaction, whether the debtor was rendered execution proof, and whether the transaction was made in good faith.<sup>2</sup>

While there is no minimum percentage or amount required to equal reasonably equivalent value, the phrase "reasonably equivalent value" means approximately equivalent or roughly equivalent.<sup>3</sup> Furthermore, it is generally recognized that a person may be a purchaser for a fair or valuable consideration although he or she has not given money or money's worth for the property. For example, legal services rendered are generally held to constitute fair consideration for such transfers.<sup>4</sup> Moreover, a marital settlement may constitute a sufficient consideration.<sup>5</sup>

In determining whether a debtor received reasonably equivalent value, the proper focus is on the net effect of the transfers on the debtor's estate and funds available to unsecured creditors.<sup>6</sup>

**Practice Tip:**

Proof of the adequacy of consideration may require a showing of an actual intent to defraud creditors to void the transaction.<sup>7</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Judgment creditor, by alleging that judgment debtor, during pendency of judgment creditor's underlying action against judgment debtor for breach of contract, conveyed to his wife his interest in a home that he and wife owned as tenants by the entirety, without fair consideration, and that the final judgment in the underlying action remained unsatisfied, stated a claim for fraudulent conveyance. [McKinney's Debtor and Creditor Law § 273–a](#). [William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh](#), 131 A.D.3d 960, 2015 WL 5124894 (2d Dep't 2015).

To show fair equivalent value for conveyance, as required under New York's Debtor and Creditor Law, neither mathematical precision nor a "penny-for-penny exchange" is required; rather, the assessment of fair equivalent value requires a court to compare the rough values of what was given and what was received in exchange. [N.Y.McKinney's Debtor and Creditor Law § 272](#). [Chen v. New Trend Apparel, Inc.](#), 8 F. Supp. 3d 406 (S.D. N.Y. 2014).

Annual salary of \$30,000 paid by judgment debtor to his wife was in full and fair consideration of wife's part-time work for judgment debtor, and thus were not fraudulent conveyances; wife's duties included bookkeeping, driving judgment debtor, planning one large special event, liaising with government agencies, and generally assisting judgment debtor with his property management responsibilities, and judgment debtor took reasonable steps to determine that salary was reasonable. [McKinney's Debtor and Creditor Law § 273–a](#). [Breslin Realty Development Corp. v. Smith & De Groat, Inc.](#), 30 N.Y.S.3d 496 (Sup 2016).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [In re Scheffler](#), 471 B.R. 464 (Bankr. E.D. Pa. 2012) (applying Pennsylvania law).
- 2 [In re TML, Inc.](#), 291 B.R. 400, 50 U.C.C. Rep. Serv. 2d 511 (Bankr. W.D. Mich. 2003) (applying Michigan law).
- 3 [In re Webb Mtn, LLC](#), 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 4 [Marroquin v. Barrial](#), 174 Cal. App. 2d 540, 345 P.2d 30 (2d Dist. 1959).

- 5 Federal Deposit Ins. Corp. v. U.S., 654 F. Supp. 794 (N.D. Ga. 1986).  
6 In re Pace, 456 B.R. 253 (Bankr. W.D. Tex. 2011) (applying Texas law).  
7 Hassett v. Goetzmann, 10 F. Supp. 2d 181 (N.D. N.Y. 1998) (applying New York law); Royal Z Lanes, Inc.  
v. Collins Holding Corp., 337 S.C. 592, 524 S.E.2d 621 (1999).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 29

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

## § 29. Adequacy of consideration—Satisfaction of antecedent debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  86, 87

### A.L.R. Library

[Transaction in consideration of discharge of antecedent debt owed by one other than grantor as based on "fair consideration" under Uniform Fraudulent Conveyance Act, 30 A.L.R.2d 1209](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 105](#) (Answer—Defense—Transferee paid for and received transfer as bona fide purchaser)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 106](#) (Answer—Defense—Property transferred to lender of purchase money)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 107](#) (Answer—Defense—Property transferred to mortgagee to satisfy mortgage indebtedness)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 141](#) (Assumption of transferor's debts by transferee as constituting reasonably equivalent value)

Satisfaction of an antecedent debt or preexisting liability is generally considered a fair consideration<sup>1</sup> if the property conveyed is fairly equivalent in value to the debt satisfied.<sup>2</sup> Alternatively, in order to satisfy the statutory requirement for "fair consideration," the conveyance may constitute a present exchange.<sup>3</sup> Where the satisfaction of an antecedent debt is acknowledged by the statute to be "value" for purposes of a fraudulent transfer analysis, the individual satisfactions flowing from payments for household expenses in exchange for a dollar-for-dollar satisfaction of household debt may provide reasonably equivalent value in exchange for those payments.<sup>4</sup>

Reasonably equivalent value, for constructive fraudulent transfer avoidance purposes, can include the elimination of claims or litigation within the scope of satisfaction of an antecedent debt.<sup>5</sup>

Conveyances that satisfy an antecedent debt made while the debtor is insolvent are neither fraudulent nor otherwise improper even if their effect is to prefer one creditor over another.<sup>6</sup> It is of no significance that the transferee has knowledge of such insolvency, and the transfer is not subject to attack by reason of knowledge on the part of the transferee that the transferor is preferring him or her to other creditors even by virtue of a secret agreement to that effect.<sup>7</sup> However, although an antecedent debt may provide fair consideration for a conveyance, it must be in an amount not disproportionately small as compared with the value of the property obtained.<sup>8</sup> Where the debtor derives little benefit from the securing of his or her antecedent debt, the debtor does not receive a reasonably equivalent value.<sup>9</sup> Furthermore, there are instances where a conveyance in exchange for an antecedent debt will not suffice, such as in the case where the transferee is an officer, director, or major shareholder of the transferor<sup>10</sup> or where an obligation is satisfied that is owed to the transferee by a third party.<sup>11</sup>

A debt that is incurred at essentially the same time as the questioned conveyance cannot constitute an antecedent debt.<sup>12</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Funds received by judgment debtor's attorneys were for bona fide legal fees and litigation expenses rendered and represented an exchange of reasonably equivalent value, and therefore attorneys did not violate Uniform Fraudulent Transfer Act (UFTA); debtor was primary defendant at underlying trial resulting in judgment rendered against him, legal fees and expenses were legitimate and owed by debtor, and retainers provided by debtor were placed in IOLTA account, remaining debtor's property and subject to attachment. R.C. §§ 1336.04(A), 1336.05, 1336.08. [Magnum Steel & Trading, L.L.C. v. Roderick Linton Belfance, L.L.P., 2015-Ohio-3450, 41 N.E.3d 204](#) (Ohio Ct. App. 9th Dist. Summit County 2015).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Federal Refinance Co., Inc. v. Klock, 352 F.3d 16 \(1st Cir. 2003\) \(applying former UFCA Massachusetts law\); Pat Clark Sports, Inc. v. Champion Trailers, Inc., 487 F. Supp. 2d 1172 \(D. Nev. 2007\) \(applying Nevada law\); Federal Nat. Mortg. Ass'n v. Olympia Mortg. Corp., 792 F. Supp. 2d 645 \(E.D. N.Y. 2011\) \(applying New York law\).](#)
- 2 [In re Jodoin, 208 B.R. 6 \(Bankr. D. N.H. 1997\) \(applying New Hampshire law\).](#)
- 3 [Federal Nat. Mortg. Ass'n v. Olympia Mortg. Corp., 792 F. Supp. 2d 645 \(E.D. N.Y. 2011\) \(applying New York law\).](#)

- 4 In re Kennedy, 279 B.R. 455 (Bankr. D. Conn. 2002) (applying Connecticut law).
- 5 In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009), *aff'd*, 2010 WL 1544092 (E.D. Tenn. 2010) (applying Tennessee law).
- 6 In re Sharp Intern. Corp., 403 F.3d 43 (2d Cir. 2005) (applying New York law); Town of Southampton v. Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25 (2d Dep't 2010).
- 7 Town of Southampton v. Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25 (2d Dep't 2010).
- 8 Joslin v. Lopez, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dep't 2003).
- 9 S.E.C. v. Whitworth Energy Resources Ltd., 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law to the fraudulent conveyance of a lien to a parent in exchange for the parent's forbearance from suit where the parent would not have sued on the lien anyway).
- 10 First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., 2012 WL 1711218 (E.D. N.Y. 2012) (applying New York law).
- 11 Dahnken, Inc. of Salt Lake City v. Wilmarth, 726 P.2d 420 (Utah 1986).
- 12 Truelove v. Buckley, 12 Fulton County D. Rep. 3360, 2012 WL 5265797 (Ga. Ct. App. 2012).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 30

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### E. Consideration for Transfer

### § 30. Adequacy of consideration—Assumption of mortgage or debts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  84

#### A.L.R. Library

[Assumption of Mortgage on Real Property as Consideration for Conveyance That Is Attacked as Fraudulent](#), 15 A.L.R.6th 241

Since a transferee's assumption of a transferor's bona fide debts can constitute a valuable and sufficient consideration for the conveyance of the grantor's property,<sup>1</sup> the assumption of a mortgage generally constitutes consideration for the conveyance of property from an insolvent grantor.<sup>2</sup> This is especially the result where the assumption is binding upon the grantee so as to make him or her the principal debtor<sup>3</sup> or where the value of the land and the amount of the mortgage are substantially equal.<sup>4</sup> However, not all such transactions will be approved; for example, despite the otherwise adequacy of the consideration, some conveyances have been voided where the grantee was unable to pay the mortgage debt which was assumed,<sup>5</sup> where the disparity between the amount of the mortgage and the value of the property is so great such that the transaction is one intended to defraud creditors,<sup>6</sup> or where the supposed consideration was the forgiveness of a debt which was at best a moral obligation.<sup>7</sup>

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#### Footnotes

<sup>1</sup> As to satisfaction of an antecedent debt as adequate consideration, see [§ 29](#).

- 2 [Thornton v. Wolf](#), 958 So. 2d 131 (La. Ct. App. 3d Cir. 2007); [Gevedon v. Ivey](#), 2003-Ohio-6521, 2003 WL 22880791 (Ohio Ct. App. 2d Dist. Montgomery County 2003) (assumption of mortgage and forgiveness of debt in exchange for title).
- 3 [Bargioni v. Hill](#), 59 Cal. 2d 121, 28 Cal. Rptr. 321, 378 P.2d 593 (1963).
- 4 [Territorial Sav. & Loan Ass'n v. Baird](#), 781 P.2d 452 (Utah Ct. App. 1989).
- 5 [Wurlitzer Distributing Corp. v. Schofield](#), 44 N.C. App. 520, 261 S.E.2d 688 (1980).
- 6 [U.S. v. Chapman](#), 756 F.2d 1237 (5th Cir. 1985) (applying Texas law).
- 7 [Morris v. Holland](#), 529 S.W.2d 948 (Mo. Ct. App. 1975).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II F Refs.

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### F. Relationship of Parties

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑 101 to 108

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#) 🔑 101 to 108

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 31

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### II. Elements, Factors, and Requisites

#### F. Relationship of Parties

## § 31. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  101 to 108

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 83](#) (Complaint, petition, or declaration—Real property transferred from one spouse to other spouse with intent to defraud creditors—Inadequate consideration)

A special relationship between the debtor and the transferee serving as circumstantial evidence of fraudulent intent, for purposes of a claim for actual fraudulent transfer, may include a family, friendship, or close associate relationship.<sup>1</sup> The fact that the parties to a transfer of property are somehow related or that a close relationship exists between them does not warrant a presumption that the transaction is fraudulent as to creditors<sup>2</sup> as each case is decided on its own facts.<sup>3</sup> While a familial relationship between the transferor and the transferee is not itself a badge of fraud, for purposes of establishing a prima facie case of fraudulent conveyance, transactions between husband and wife must be closely scrutinized to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors.<sup>4</sup> Moreover, the relationship of the parties,<sup>5</sup> including that of parent and child, when coupled with other suspicious circumstances, gives rise to an inference of fraud.<sup>6</sup> Thus, for purposes of a constructive fraudulent conveyance claim, presumptions of good faith and reasonably equivalent value do not apply if the transfer is made to an insider.<sup>7</sup> A transfer to a family member or an affiliated corporation alone is not dispositive of a fraudulent intent<sup>8</sup> and may not by itself constitute a badge of fraud.<sup>9</sup> Thus, according to some courts, there is generally no presumption that transactions between close relatives or insiders are per se fraudulent<sup>10</sup> though a familial relationship may strengthen the presumption of fraud that arises from other circumstances<sup>11</sup> and constitute

weighty proof of fraudulent intent.<sup>12</sup> Under this line of thought, evidence of a transfer to an insider is only one factor to consider in determining actual intent to defraud, and that fact alone does not support a conclusion the transfer constitutes a fraudulent transfer.<sup>13</sup> However, the rule is different if, at the time of an interspousal conveyance, a conveying spouse was in financial difficulty, and the conveyance was made with the actual intent to hinder, delay, or defraud the conveyor's creditors; in such a case, that conveyance is considered prima facie fraudulent.<sup>14</sup>

Indeed, a transfer between spouses, either before or after the dissolution of their marriage, may be avoided as a fraudulent transfer.<sup>15</sup> Moreover, at least one court has pointed out that fraudulent intent is presumed when property is transferred to relatives.<sup>16</sup> Another court has stated that a conveyance will be deemed fraudulent where the transfer is to an insider and if it is for an antecedent debt, and the insider knew the debtor was insolvent.<sup>17</sup> In determining insider status, courts are to consider (1) the closeness of the relationship between the transferee and the debtor and (2) whether the transactions were at arm's length.<sup>18</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Under Kentucky law, a transfer between two related parties is typically a badge of fraud. [KRS 378.010. Jadco Enterprises, Inc. v. Fannon](#), 991 F. Supp. 2d 947 (E.D. Ky. 2014).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Kaisha v. Dodson](#), 423 B.R. 888 (N.D. Cal. 2010) (applying California law).  
A relative or partner of the debtor can constitute an insider. [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (applying Illinois law).  
A paramour whom debtor never married following her divorce from another man was not "insider," for fraudulent transfer avoidance purposes, [In re Grove-Merritt](#), 406 B.R. 778 (Bankr. S.D. Ohio 2009) (applying Ohio law), nor was an unmarried cohabiting partner. [Porter v. Saez](#), 2004-Ohio-2498, 2004 WL 1103508 (Ohio Ct. App. 10th Dist. Franklin County 2004).
- 2 [In re Laines](#), 352 B.R. 397 (Bankr. E.D. Va. 2005) (applying Virginia law); [Gurley v. Blue Rents, Inc.](#), 383 So. 2d 531 (Ala. 1980).
- 3 [Childress v. Fidelity & Cas. Co. of N. Y.](#), 194 Va. 191, 72 S.E.2d 349, 35 A.L.R.2d 1 (1952).
- 4 [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 5 [In re Dreier LLP](#), 452 B.R. 391 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 6 [S.E.C. v. Whitworth Energy Resources Ltd.](#), 26 Fed. Appx. 723 (9th Cir. 2002).
- 7 [In re Old CarCo LLC](#), 435 B.R. 169 (Bankr. S.D. N.Y. 2010) (applying New York law).
- 8 [In re Schofield-Johnson, LLC](#), 462 B.R. 539 (Bankr. M.D. N.C. 2011) (applying North Carolina law).  
However, when a creditor attacks a conveyance between spouses, slight circumstances may be sufficient to establish fraud. [Gerschick v. Pounds](#), 281 Ga. App. 531, 636 S.E.2d 663 (2006).
- 9 [Production Credit Ass'n of Midlands v. Shirley](#), 485 N.W.2d 469, 18 U.C.C. Rep. Serv. 2d 562 (Iowa 1992); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).
- 10 [In re Mussa](#), 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law); [G.M. Houser, Inc. v. Rodgers](#), 204 S.W.3d 836 (Tex. App. Dallas 2006).
- 11 [In re Laines](#), 352 B.R. 397 (Bankr. E.D. Va. 2005) (applying Virginia law).
- 12 [In re Phillips](#), 379 B.R. 765 (Bankr. N.D. Ill. 2007) (applying Illinois law).



- 13 [Doyle v. Kontemporary Builders, Inc.](#), 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 14 [Citizens & Southern Nat. Bank v. Auer](#), 514 F. Supp. 638 (E.D. Tenn. 1981) (applying Tennessee law).
- 15 [In re Beverly](#), 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law).
- 16 [U.S. v. Harrison](#), 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d 2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008) (applying Texas law).
- 17 [Truelove v. Buckley](#), 12 Fulton County D. Rep. 3360, 2012 WL 5265797 (Ga. Ct. App. 2012).
- 18 [Essex Crane Rental Corp. v. Carter](#), 371 S.W.3d 366 (Tex. App. Houston 1st Dist. 2012), reh'g overruled, (June 7, 2012) and review denied, (Aug. 31, 2012).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 32

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### F. Relationship of Parties

### § 32. Effect of parties' relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  101 to 108

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 82](#) (Complaint, petition, or declaration—Conveyance of separate property of debtor spouse to other spouse with intent to defraud creditor—Absence of any consideration for transfer)

Because spouses, as well as other relatives or persons closely related to the debtor, have unusual opportunities for the perpetration of fraud, it is generally held that conveyances between relatives or "insiders"<sup>1</sup> must be carefully or closely scrutinized by the courts,<sup>2</sup> and at the very least, it is a consideration as to whether a transfer was a fraudulent conveyance.<sup>3</sup> Additionally, where the fact of fraud is in issue or where suspicious circumstances exist, that may be sufficient to raise an inference of fraud in a conveyance.<sup>4</sup> This same rule applies where one person is on both sides of the same transaction.<sup>5</sup> Thus, the courts have ruled that among the recognized indicia or badges of fraud is the fact that the transfer is between members of a family,<sup>6</sup> or persons related by marriage,<sup>7</sup> particularly where the transfer causes the family member or spouse to become insolvent.<sup>8</sup> The same position has been taken where the parties to the conveyance are associated in business<sup>9</sup> or any other confidential relationship.<sup>10</sup>

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#### Footnotes

- 1 In re Mussa, 215 B.R. 158 (Bankr. N.D. Ill. 1997) (applying Illinois law); Morris v. Nance, 132 Or. App. 216, 888 P.2d 571 (1994) (holding former husband of debtor was an "insider").
- 2 U.S. v. Porath, 764 F. Supp. 2d 883 (E.D. Mich. 2011), aff'd, 2012-2 U.S. Tax Cas. (CCH) P 50506, 110 A.F.T.R.2d 2012-5452, 2012 WL 3156390 (6th Cir. 2012) (applying Michigan law); In re Jacobs, 394 B.R. 646 (Bankr. E.D. N.Y. 2008) (applying New York law); In re Stanley, 384 B.R. 788 (Bankr. S.D. Ohio 2008) (applying Ohio law); Laird v. Weigh Systems South II, Inc., 98 Ark. App. 393, 255 S.W.3d 900 (2007); Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366 (Tex. App. Houston 1st Dist. 2012), reh'g overruled, (June 7, 2012) and review denied, (Aug. 31, 2012).
- 3 General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 47 Fed. R. Evid. Serv. 670 (11th Cir. 1997) (applying Florida law).
- 4 Johnson v. Drew, 218 Cal. App. 2d 614, 32 Cal. Rptr. 540 (2d Dist. 1963).
- 5 Brown v. Cooper, 237 Ga. App. 348, 514 S.E.2d 857 (1999); South Side Nat. Bank in St. Louis v. Winfield Financial Services Corp., 783 S.W.2d 140 (Mo. Ct. App. E.D. 1989) (corporation to whom transfer was made was controlled by debtor).
- 6 Ginsburg v. Ginsburg, 353 Ark. 816, 120 S.W.3d 567 (2003).
- 7 Banner Const. Corp. v. Arnold, 128 So. 2d 893 (Fla. 1st DCA 1961).
- 8 Granwell v. Granwell, 20 N.Y.2d 91, 281 N.Y.S.2d 783, 228 N.E.2d 779 (1967).
- 9 In re Beshears, 182 B.R. 235 (Bankr. E.D. Ark. 1995) (applying Arkansas law) (insider); In re White Metal Rolling and Stamping Corp., 222 B.R. 417 (Bankr. S.D. N.Y. 1998) (affiliate or insider) (applying New York law).
- 10 Russell County Feed Mill, Inc. v. Kimbler, 520 S.W.2d 309 (Ky. 1975).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers II G Refs.

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

#### G. Reservation of Interest, Right, or Benefit

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#) 🔑 109, 110, 112, 113

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#) 🔑 109, 110, 112, 113

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 33

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### II. Elements, Factors, and Requisites

#### G. Reservation of Interest, Right, or Benefit

## § 33. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  109, 110

A characteristic of a fraudulent conveyance is a reservation of a benefit to the transferor or his or her family.<sup>1</sup> In other words, one may not be the beneficial owner of property and still have it exempt from his or her debts.<sup>2</sup> In fact, the courts have consistently held that no effort of a debtor to hinder or delay his or her creditors is more severely condemned than an attempt to place the debtor's property where he or she can enjoy it and at the same time require his or her creditors to await for the payment of their claims out of it.<sup>3</sup>

Whether the transferor receives benefits from the asset after the transfer or retains control over the asset after the transfer is relevant to whether the transfer is fraudulent, but it is not the only pertinent fact, and even though the existence of a continuing legal or financial relationship after the transfer may indicate bad faith, the lack of such a relationship does not establish good faith.<sup>4</sup>

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### Footnotes

- 1 [U.S. v. Larson](#), 625 F. Supp. 134 (E.D. Wash. 1985); [In re O.P.M. Leasing Services, Inc.](#), 40 B.R. 380 (Bankr. S.D. N.Y. 1984), order aff'd, 44 B.R. 1023 (S.D. N.Y. 1984) (applying Oregon law).
- 2 [Crane, for Use of Niemeyer v. Illinois Merchants Trust Co.](#), 238 Ill. App. 257, 1925 WL 4524 (1st Dist. 1925).
- 3 [Commercial State Sav. Bank v. Bird](#), 254 Mich. 418, 237 N.W. 57 (1931).
- 4 [For Your Ease Only, Inc. v. Calgon Carbon Corp.](#), 560 F.3d 717 (7th Cir. 2009) (applying Illinois law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 34

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### G. Reservation of Interest, Right, or Benefit

### § 34. Trust in behalf of transferor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  109, 110, 112

A conveyance of property in trust for the benefit of the grantor has frequently been held to be invalid,<sup>1</sup> such as where a decedent conveyed property for his or her own benefit<sup>2</sup> or where a trust to which property is conveyed is the alter ego or nominee of the defendant, and the court finds that the defendant is the true, beneficial owner.<sup>3</sup> Although the validity of such conveyances has been upheld in some cases,<sup>4</sup> it is a general rule that an individual cannot create out of his or her own property, for his or her own benefit, a trust containing assets over which the individual has control and possession and thereby defeat the lawful claims of creditors.<sup>5</sup> Equally, the debtor's transfer of property to a trust for the benefit of his or her children is a fraudulent conveyance where the debtor retains control over the trust<sup>6</sup> and also even though a family member is the ostensible trustee.<sup>7</sup> Thus, transfers of trust assets after the entry of judgment against the debtor are fraudulent conveyances and must be set aside where the evidence establishes that the debtor retained unfettered discretion and control over the assets of a trust; transfers to the trust were made after the instigation of the lawsuit and the debtor, as trustee, transferred funds from the trust to the debtor's own benefit, with many of the transfers following closely on the heels of the entry of judgment.<sup>8</sup> The defendant's transfer of a limited liability company's sole asset, real estate, from the company to a trust controlled by the defendant and the other individual defendants for the purchase price of \$10, without payment of city and state transfer taxes, and in violation of the terms of the mortgage, is also a fraudulent conveyance<sup>9</sup> as are transfers to a trust where the intended effect is to shield a debtor's assets from creditors in order to allow him or her additional time to pursue and defend pending litigation.<sup>10</sup> However, transfer of a residence from the debtor to a family trust some six years before guaranteeing the loan and 10 years before filing a petition for bankruptcy, without further evidence that the debtor was experiencing financial difficulties at the time of the transfer, is insufficient indicia of fraud to show that the conveyance was intended to defraud creditors.<sup>11</sup> Moreover, a trust created by taxpayers for the benefit of their children is a legal entity separate and apart from the taxpayers, rather than a nominee or alter ego of the settlor, for purposes of determining whether the United States could enforce a tax lien against real estate held by the trust, even though the taxpayer attempted to orchestrate the functioning of the trust so that he maintained influence over its operation, where the taxpayers ceased to enjoy

the benefits or shoulder the burdens of the property after transfer to the trust; the trust paid expenses to maintain the property, received rents, and paid taxes; and, upon dissolution, the intended beneficiaries of the trust received its assets free from any actual or equitable claim against them by the taxpayers.<sup>12</sup> However, transfers of real estate to the trust made with actual intent to defeat a claim and to hinder collection constitute fraudulent conveyances, even though the transfers were made to cancel an antecedent debt, where the loan was made in contravention of the trust's prohibition against loans to settlors, and the parcels were conveyed on the date the creditor, the IRS, informed the settlor that it was about to commence collection proceedings.<sup>13</sup>

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#### Footnotes

- 1 Nolan v. Nolan, 218 Pa. 135, 67 A. 52 (1907).
- 2 U.S. v. Schofield, 152 F. Supp. 529 (E.D. Pa. 1957).
- 3 U.S. v. Stinson, 386 F. Supp. 2d 1207 (W.D. Okla. 2005) (applying Oklahoma law).
- 4 Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 167 Md. 158, 173 A. 31, 93 A.L.R. 1205 (1934).
- 5 U.S. v. Boscaljon, 105 A.F.T.R.2d 2010-1501, 2010 WL 1053688 (D.S.D. 2010) (applying South Dakota law); In re Mastro, 465 B.R. 576 (Bankr. W.D. Wash. 2011) (applying Washington law).
- 6 In re Beatrice, 277 B.R. 439 (Bankr. D. Mass. 2002), aff'd, 296 B.R. 576 (B.A.P. 1st Cir. 2003) (applying Massachusetts law).
- 7 In re Krause, 386 B.R. 785 (Bankr. D. Kan. 2008), decision aff'd, Bankr. L. Rep. (CCH) P 81734, 2010-1 U.S. Tax Cas. (CCH) P 50222, 105 A.F.T.R.2d 2010-731, 2009 WL 5064348 (D. Kan. 2009), aff'd, 637 F.3d 1160 (10th Cir. 2011) (applying Kansas law).
- 8 Comcast of IL X v. Multi-Vision Electronics, Inc., 504 F. Supp. 2d 740 (D. Neb. 2007) (applying Nebraska law).
- 9 Man Choi Chiu v. Chiu, 38 A.D.3d 619, 832 N.Y.S.2d 89 (2d Dep't 2007).
- 10 In re Potter, 2008 WL 5157877 (Bankr. D. N.M. 2008) (applying New Mexico and California law).
- 11 Lakeside Lumber Products, Inc. v. Evans, 2005 UT App 87, 110 P.3d 154 (Utah Ct. App. 2005).
- 12 Sumpter v. U.S., 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).
- 13 Sumpter v. U.S., 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 35

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### G. Reservation of Interest, Right, or Benefit

### § 35. Trust in behalf of transferor—Secret reservation or trust for grantor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  113

A secret reservation or trust in favor of the grantor in a conveyance of property is a badge of fraud<sup>1</sup> and usually is viewed as being per se fraudulent and void as to creditors.<sup>2</sup> However, the inference of it being per se fraudulent is not conclusive.<sup>3</sup> It still must be shown that the effect of the reservation is to place assets of the transferor out of the reach of his or her creditors<sup>4</sup> and that the trust or reservation was controlled by the debtor and never operated separately from the debtor's interests.<sup>5</sup> If the result of the reservation is to defeat the rights of creditors, the transaction is illegal regardless of the actual intention of the parties thereto.<sup>6</sup> In expanding on this concept, courts have identified an “illusory transfer”—one which takes back all that it gives—and a “colorable transfer”—where the transfer appears absolute on its face, but due to some secret or tacit understanding between the transferee and transferor, it is not transferred because the parties intended ownership to be retained by the transferor.<sup>7</sup>

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#### Footnotes

- 1 [Alan Drey Co., Inc. v. Generation, Inc.](#), 22 Ill. App. 3d 611, 317 N.E.2d 673 (1st Dist. 1974).
- 2 [Friedel v. Bailey](#), 329 Mo. 22, 44 S.W.2d 9 (1931).
- 3 [Bank of California v. Virtue & Scheck, Inc.](#), 140 Cal. App. 3d 1026, 190 Cal. Rptr. 54 (4th Dist. 1983).
- 4 [Farkas v. Katz](#), 54 F.2d 1061 (C.C.A. 5th Cir. 1932).
- 5 [South Carolina Nat. Bank v. Halter](#), 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987).
- 6 [Farkas v. Katz](#), 54 F.2d 1061 (C.C.A. 5th Cir. 1932).
- 7 [In re Marriage of Frederick](#), 218 Ill. App. 3d 533, 161 Ill. Dec. 254, 578 N.E.2d 612 (2d Dist. 1991).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 36

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### H. Retention of Possession of Property

###### 1. In General

### § 36. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  131 to 146(3)

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 142, 143](#) (Jury instructions—Change of possession as prerequisite to valid transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 144](#) (Jury instructions—Retention of possession as evidence of fraud)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 146](#) (Jury instructions—Good faith as jury question where possession retained by transferor)

The law of fraudulent conveyances seeks to avoid a deceptive appearance of ownership through a debtor's retention of possession after title to the property has passed to a stranger.<sup>1</sup> Accordingly, the courts follow a general rule that a transferor's retention of all or some of his or her property,<sup>2</sup> or the use and enjoyment of property,<sup>3</sup> or the transferor's retention of the possession, benefit,<sup>4</sup> or use of the property after a conveyance or transfer of real<sup>5</sup> or personal<sup>6</sup> property, assets,<sup>7</sup> property of a business,<sup>8</sup> estate interest,<sup>9</sup> or an absolute sale, is a classic indication of a fraudulent conveyance<sup>10</sup> in the absence of any valid reason. At the very least, it is clearly a consideration as to whether or not a fraudulent conveyance occurred.<sup>11</sup>

The transfer of the debtor's assets to a family member, where the debtor retains control<sup>12</sup> and possession<sup>13</sup> or continues to use the property and treat it as his or her own,<sup>14</sup> is an indication of a fraudulent conveyance. Also, the transfer of the debtor's assets to a limited liability company, controlled by the spouse of the owner of the debtor, also supports the finding of a fraudulent conveyance where the company pays the owner a salary and provides him and his spouse with payment of numerous expenses, in return for which the debtor provides minimal services.<sup>15</sup> However, the mere fact that the debtor's agent retains possession of real property following the debtor's sale to a company controlled by the agent does not establish that the debtor maintained possession or control of the units following transfer where the creditor does not allege that the agent's retention of the property allowed the debtor to retain any degree of possession or control over the units, and the creditor does not explain how the agent's retention of the property indicates the creditor's fraudulent intent.<sup>16</sup>

**Practice Tip:**

A judgment creditor states causes of action under fraudulent conveyance statutes by alleging that the defendant fraudulently transferred assets from judgment debtors to family members and corporations, which were allegedly under the exclusive control of the defendant and another individual, and that those transfers rendered the judgment debtors insolvent and were undertaken with the intent to hinder the creditor's rights as a judgment creditor.<sup>17</sup>

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**Footnotes**

- 1 [Graves Const. Co., Inc. v. Rockingham Nat. Bank](#), 220 Va. 844, 263 S.E.2d 408, 28 U.C.C. Rep. Serv. 588 (1980).
- 2 [U.S. v. West](#), 299 F. Supp. 661 (D. Del. 1969).
- 3 [U.S. v. Engh](#), 330 F.3d 954 (7th Cir. 2003) (applying Illinois law).
- 4 [Eyler v. C.I.R.](#), 760 F.2d 1129 (11th Cir. 1985).
- 5 [S.E.C. v. Whitworth Energy Resources Ltd.](#), 26 Fed. Appx. 723 (9th Cir. 2002) (applying California law); [Grochocinski v. Schlossberg](#), 402 B.R. 825 (N.D. Ill. 2009) (debtor retained beneficial ownership of residence); [Langaa v. Pauer](#), 2005-Ohio-6296, 2005 WL 3150251 (Ohio Ct. App. 11th Dist. Geauga County 2005) (conveyance of home to daughter); [Garcia v. Guerrero](#), 2010 WL 183480 (Tex. App. San Antonio 2010).
- 6 [Superior Partners v. Professional Educ. Network, Inc.](#), 138 Ill. App. 3d 226, 93 Ill. Dec. 8, 485 N.E.2d 1218 (1st Dist. 1985).
- 7 [Hassett v. Goetzmann](#), 10 F. Supp. 2d 181 (N.D. N.Y. 1998) (applying New York law).
- 8 [U.S. v. Harrison](#), 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d 2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008) (applying Texas law; debtor's continued use of property after transfer of business assets to an employee with questionable funds); [In re Seitz](#), 400 B.R. 707 (Bankr. E.D. Mo. 2008) (applying Missouri law); [Fox Rest Associates, L.P. v. Little](#), 282 Va. 277, 717 S.E.2d 126 (2011).  
Some courts have held, however, that a debtor may hold on to the property of a business for a commercially reasonable time. [In re Fritz-Mair Mfg. Co.](#), 16 B.R. 417, 33 U.C.C. Rep. Serv. 554 (Bankr. N.D. Tex. 1982).

- 9 Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio, 37 Ohio App. 3d 162, 524 N.E.2d 915 (5th  
Dist. Stark County 1987) (debtor retained life estate).
- 10 In re Roberts, 81 B.R. 354 (Bankr. W.D. Pa. 1987).
- 11 Clark v. Bank of Bentonville, 308 Ark. 241, 824 S.W.2d 358 (1992).
- 12 Cadle Co. v. Newhouse, 74 Fed. Appx. 152 (2d Cir. 2003) (applying New York law; transferor retained  
power of attorney to withdraw funds from bank account).
- 13 In re Schofield-Johnson, LLC, 462 B.R. 539 (Bankr. M.D. N.C. 2011) (applying North Carolina law; transfer  
of judgment proceeds).
- 14 U.S. v. Harrison, 366 B.R. 656 (S.D. Tex. 2007), motion for stay pending appeal denied, 99 A.F.T.R.2d  
2007-2748, 2007 WL 1428635 (S.D. Tex. 2007) and judgment aff'd, 273 Fed. Appx. 315 (5th Cir. 2008)  
(applying Texas law).
- 15 In re Dealers Agency Services, Inc., 380 B.R. 608 (Bankr. M.D. Fla. 2007) (applying Florida law).
- 16 Schempp v. Lucre Management Group, LLC, 75 P.3d 1157 (Colo. App. 2003).
- 17 320 West 13th Street, LLC v. Wolf Shevack, Inc., 85 A.D.3d 629, 926 N.Y.S.2d 77 (1st Dep't 2011).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 37

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

#### H. Retention of Possession of Property

##### 1. In General

### § 37. Simulated sales

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  131 to 146(3)

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances §§ 144, 145](#) (Instructions to jury—Retention of possession as evidence of fraud)

An example of an unlawful retention<sup>1</sup> is a simulated sale or as it is sometimes referred to as a "non-transfer simulation."<sup>2</sup> This type of "sale" occurs where the debtor does not transfer property, despite the representation of a transfer. In reality, the transaction is a sham and, as a result, an absolute nullity<sup>3</sup> that may be declared null at any time at the demand of any person in interest.<sup>4</sup> The simulation is absolute when the parties intend that their contract shall produce no effects between them.<sup>5</sup> An absolute simulation cannot defeat good faith creditors and bona fide purchasers who rely on the public record of the contract.<sup>6</sup> In contrast, a relative simulation is one in which the parties intend that the contract produce effects that are different from those recited in their contract.<sup>7</sup>

The retention of possession after an absolute sale is not enough to find a violation.<sup>8</sup> There must also be proof that the transferor, in addition to retaining possession, continued to receive income from the property conveyed. This situation would suggest that the conveyance was fraudulent<sup>9</sup> or that the transferor had an interest in the entity to which he or she transferred the property

which, coupled with other circumstances, can create a fraudulent conveyance.<sup>10</sup> Moreover, a lease back of property sold by the debtor does not establish a simulation where valuable consideration was given for the property, and the leases were valid.<sup>11</sup>

**Observation:**

The children of transferees are not protected third parties under the law of registry, in an action brought by the transferor who alleged that the sales of immovable properties to the transferees were simulations, and the children were bound by any promises of the transferees to return to the transferor the record title as the children's acceptance of their parents' successions obligated them for the mutual agreement of their parents' simulation.<sup>12</sup>

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**Footnotes**

- 1 §§ 36 to 38.
- 2 Sabrier v. Leard, 426 So. 2d 213 (La. Ct. App. 4th Cir. 1982).
- 3 Johnson v. Unopened Succession of Alfred Covington, Jr., 969 So. 2d 733 (La. Ct. App. 2d Cir. 2007).
- 4 Hutsen v. Davis, 983 So. 2d 266 (La. Ct. App. 3d Cir. 2008).
- 5 Miller v. Jackson, 80 So. 3d 673 (La. Ct. App. 3d Cir. 2011).
- 6 KeyBank Nat. Ass'n v. Perkins Rowe Associates, LLC, 823 F. Supp. 2d 399 (M.D. La. 2011) (applying Louisiana law).
- 7 Mathews v. Mathews, 1 So. 3d 738 (La. Ct. App. 2d Cir. 2008).
- 8 Twin Ports Oil Co. v. Whiteside, 218 Minn. 78, 15 N.W.2d 125 (1944).
- 9 Cleveland Trust Co. v. Foster, 93 So. 2d 112 (Fla. 1957).
- 10 F.D.I.C. v. Proia, 663 A.2d 1252 (Me. 1995).
- 11 Entergy Louisiana, Inc. v. Kennedy, 859 So. 2d 74 (La. Ct. App. 1st Cir. 2003), writ denied, 858 So. 2d 430 (La. 2003).
- 12 Sonnier v. Conner, 998 So. 2d 344 (La. Ct. App. 2d Cir. 2008), writ denied, 6 So. 3d 773 (La. 2009).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 38

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### II. Elements, Factors, and Requisites

##### H. Retention of Possession of Property

##### 2. Requisites as to, and Sufficiency of, Delivery or Change of Possession

### § 38. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  147 to 153

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 51](#) (Complaint—Allegation—Possession of described real property by transferee)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 115](#) (Jury instructions—Definition of transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 142](#) (Jury instructions—Change of possession as prerequisite to valid transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 149](#) (Jury instructions—Property in possession of third party)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 150](#) (Jury instructions—Transfer of bill of lading as sufficient delivery)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 151](#) (Jury instructions—Necessity for actual delivery of growing crops)

Unless the goods sold are of such a nature as to make actual delivery impossible, there must be an actual delivery, transfer,<sup>1</sup> diminution in assets,<sup>2</sup> or a conveyance of goods<sup>3</sup> unless otherwise permitted by law. The delivery or transfer should not impair the rights of creditors,<sup>4</sup> or else, it is subject to a presumption of fraud and invalidity as to the creditors of the transferor.<sup>5</sup> In other words, to effectuate a transfer or conveyance, the situation cannot be one in which the debtor treats the property in exactly the



same manner after the transfer as he or she did before that time.<sup>6</sup> Delivery of property is one factor in showing that a conveyance is not actually a simulated contract<sup>7</sup> or a fraudulent conveyance.<sup>8</sup> Similarly, a transfer to a third person will not suffice, if it is made to a third person who merely serves as a conduit to the transferor, where the transferee subsequently reconveys the property back to the debtor or where the debtor still had access to and use of the property.<sup>9</sup>

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Footnotes

- 1 [In re Checkmate Stereo and Electronics, Ltd.](#), 9 B.R. 585 (Bankr. E.D. N.Y. 1981), [aff'd](#), 21 B.R. 402, 11 Fed. R. Evid. Serv. 78, 34 Fed. R. Serv. 2d 1177 (E.D. N.Y. 1982).  
A "transfer" does not occur when the property conveyed remains available to the debtor after the transfer. [Gagan v. Gouyd](#), 73 Cal. App. 4th 835, 86 Cal. Rptr. 2d 733 (4th Dist. 1999) (disapproved of on other grounds by, [Mejia v. Reed](#), 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003)).
- 2 [Comjean v. Cruickshank](#), 191 B.R. 504 (D. Mass. 1995).
- 3 [In re Harper](#), 132 B.R. 349 (Bankr. S.D. Ohio 1991) (applying Ohio law).
- 4 [Tcherepnin v. Franz](#), 475 F. Supp. 92 (N.D. Ill. 1979) (applying Illinois law).
- 5 [Hawes v. Central Texas Production Credit Ass'n](#), 503 S.W.2d 234 (Tex. 1973).
- 6 [F.P.P. Enterprises v. U.S.](#), 830 F.2d 114 (8th Cir. 1987).
- 7 [Thornton v. Wolf](#), 958 So. 2d 131 (La. Ct. App. 3d Cir. 2007).
- 8 [In re M. Fabrikant & Sons, Inc.](#), 394 B.R. 721 (Bankr. S.D. N.Y. 2008) (applying New York law).
- 9 [In re Saylor](#), 178 B.R. 209 (B.A.P. 9th Cir. 1995), [decision aff'd](#), 108 F.3d 219 (9th Cir. 1997) (applying California law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers III B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  24(1), 57(5), 58, 94, 95(.5), 95(2), 95(3), 95(11), 96

### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  24(1), 57(5), 58, 94, 95(.5), 95(2), 95(3), 95(11), 96

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 53

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

## § 53. Antenuptial settlement or conveyance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  24(1), 94, 95(2)

### A.L.R. Library

[Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as a fraud upon creditors, 7 A.L.R.2d 1104](#)

An antenuptial settlement made in good faith in contemplation of marriage is good against the transferor's creditors.<sup>1</sup> Marriage has been said to be not only a valuable consideration but also one which is respected in the law more than any other.<sup>2</sup> The transferee has the status of an innocent purchaser.<sup>3</sup> Thus, the United States is not entitled to set aside, as a fraudulent conveyance, a transfer of real property by a taxpayer to his wife pursuant to a prenuptial agreement where the promise of marriage and the waiver of other marital rights provided sufficient consideration, and the conveyance was not made as part of a fraudulent scheme.<sup>4</sup> However, a court has found that an insolvent debtor's transfer, to a person he called his "proposed wife," of his interest in real estate held as a joint tenant with the proposed wife was a fraudulent conveyance though the proposed wife promised in an antenuptial agreement to waive all marital rights arising from the marriage as the promise was not "fair consideration" for the transfer.<sup>5</sup>

Where an antenuptial agreement to convert the spouses' property to entireties was not founded on a consideration of marriage but was simply a scheme to defeat creditors, the wife's creditors could reach land held by the entireties that had been received in exchange for land owned by the wife alone.<sup>6</sup>

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Footnotes

- 1 American Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929).
- 2 American Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929).
- 3 Braecklein v. McNamara, 147 Md. 17, 127 A. 497, 41 A.L.R. 1159 (1925).
- 4 Miele v. U.S., 637 F. Supp. 998 (S.D. Fla. 1986).
- 5 Corporation of Lloyd's v. Funk, 246 A.D.2d 570, 668 N.Y.S.2d 211 (2d Dep't 1998).
- 6 Whetstone v. Coslick, 117 Fla. 203, 157 So. 666, 96 A.L.R. 455 (1934).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 54

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

## § 54. Postnuptial settlement or conveyance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  57(5), 94, 95(11)

### A.L.R. Library

[Validity of Postnuptial Agreements in Contemplation of Spouse's Death](#), 87 A.L.R.6th 495

### Trial Strategy

[Waiver of Spousal Rights in Estate of Deceased Spouse](#), 7 Am. Jur. Proof of Facts 2d 443

### Forms

[Am. Jur. Legal Forms 2d §§ 61:79 to 61:117, 91:11 to 91:14, 91:22 to 91:25, 139:96 to 139:120](#)

[Am. Jur. Pleading and Practice Forms, Dower and Curtesy § 8](#)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 82](#) (Complaint, petition, or declaration—Conveyance of separate property of debtor spouse to other spouse with intent to defraud creditor—Absence of any consideration for transfer)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 83](#) (Complaint, petition, or declaration—Real property transferred from one spouse to other spouse with intent to defraud creditors—Inadequate consideration)

#### Law Reviews and Other Periodicals

Browne, *The Intriguing Potential of Postnuptial Contract Modifications*, 23 *Hastings Women's L.J.* 187 (Summer 2012)

Williams, *Postnuptial Agreements*, 2007 *Wis. L. Rev.* 827 (2007)

A debtor's conduct in transferring his or her ownership interest in property to the spouse, without consideration, or without reasonably equivalent value, where the debtor was insolvent or anticipating insolvency at the time of the transfers, or should reasonably have believed that he or she would incur debts beyond his or her reasonable ability to pay, constitutes a fraudulent conveyance.<sup>1</sup> Also, as in other cases generally, a postnuptial settlement will be void if made by the parties with the actual intent of hindering, delaying, or defrauding the settlor's creditors.<sup>2</sup> Furthermore, an agreement between spouses involving one party transferring all her assets to the other, rendering her insolvent and unable to pay the attorney's fees she had previously acknowledged, constitutes a fraudulent conveyance.<sup>3</sup> A postnuptial settlement, however, is usually valid as against subsequent creditors if there is no fraud, and the transferor is not seriously in debt at the time when he or she makes it.<sup>4</sup>

The conveyance is sustainable in the absence of proof of actual fraud where it appears that the transferee furnished a valuable consideration for the conveyance.<sup>5</sup> However, the performance by the transferee spouse of his or her ordinary marital or household duties is not a sufficient consideration to support a conveyance to the transferee spouse by the transferor spouse as against the transferor's creditors.<sup>6</sup>

A transfer accomplished through a marital settlement agreement is not immune from attack and may in an appropriate case be avoided as a fraudulent transfer under the Uniform Fraudulent Transfer Act.<sup>7</sup> Divorcing couples do not have a one-time-only opportunity to defraud their creditors by including a fraudulent transfer in the marital settlement agreement.<sup>8</sup> Indeed, the victims of fraud are entitled to pursue disgorgement from a spouse who receives the transfer of fraudulently obtained assets in a divorce settlement where it is demonstrated that the transferee-spouse was aware of or participated in the fraud or otherwise failed to act in good faith, such as where the parties entered into a collusive divorce arrangement designed to conceal stolen money from its rightful owner.<sup>9</sup> Even where the spouse who obtains fraudulently obtained assets executed a divorce settlement agreement in good faith and without knowledge of the source of the ill-gotten gains, the defrauded parties may still recover if the spouse did not give fair consideration for the property.<sup>10</sup> Also, a trial court could find that the parties' divorce was not a sham and still find that they acted with fraudulent intent, in violation of the Uniform Fraudulent Transfer Act, when transferring assets during the divorce.<sup>11</sup> However, a bankruptcy court should not interfere with the outcome of a state court divorce action, by setting aside its distribution of marital assets on a constructive fraudulent transfer theory, if this distribution was the result of a regularly conducted proceeding under state law and if there is no proof of collusion or other extrinsic fraud.<sup>12</sup>

Transfers from one form of exemption to another are commonly protected from avoidance as fraudulent transfers even if the proceeds pass through a nonexempt account.<sup>13</sup>

Footnotes

- 1 CSX Transportation, Inc. v. Leggett, 2010 WL 3210841 (N.D. Ga. 2010) (applying Georgia law); Klein v. Weidner, 2010 WL 571800 (E.D. Pa. 2010) (applying Pennsylvania law); In re Grimlie, 439 B.R. 710 (B.A.P. 8th Cir. 2010) (applying Minnesota law).
- 2 Best v. Smith, 193 Pa. 89, 44 A. 329 (1899).
- 3 Kraisinger v. Kraisinger, 2011 PA Super 264, 34 A.3d 168 (2011).
- 4 Schreyer v. Platt, 134 U.S. 405, 10 S. Ct. 579, 33 L. Ed. 955 (1890).
- 5 Ficklin's Adm'r v. Rixey, 89 Va. 832, 17 S.E. 325 (1893).  
As to preferential transfer to spouse, see § 70.
- 6 Dempster Mill Mfg. Co. v. Bundy, 64 Kan. 444, 67 P. 816 (1902).
- 7 In re Beverly, 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law); Clayton v. Wilson, 145 Wash. App. 86, 186 P.3d 348 (Div. 1 2008), aff'd, 168 Wash. 2d 57, 227 P.3d 278 (2010).
- 8 In re Beverly, 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law).
- 9 Commodity Futures Trading Com'n v. Walsh, 17 N.Y.3d 162, 927 N.Y.S.2d 821, 951 N.E.2d 369 (2011).
- 10 Commodity Futures Trading Com'n v. Walsh, 17 N.Y.3d 162, 927 N.Y.S.2d 821, 951 N.E.2d 369 (2011).
- 11 Fadel v. El-Tobgy, 245 Or. App. 696, 264 P.3d 150 (2011), review denied, 351 Or. 675, 276 P.3d 1123 (2012).
- 12 In re Zerbo, 397 B.R. 642 (Bankr. E.D. N.Y. 2008) (applying New York law).
- 13 In re Beverly, 374 B.R. 221 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying California law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 55

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

## § 55. Transfer by third person to member of debtor's family

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [57\(5\)](#), [58](#), [94](#), [95\(11\)](#)

### A.L.R. Library

[Right of creditors to attack as fraudulent a conveyance by third person to debtor's spouse](#), 35 A.L.R.2d 8

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 84](#) (Complaint, petition, or declaration—Transfer through dummy grantee to transferor's spouse with intent to defraud creditors)

The rules regulating transfers between persons who are shown to have been related by blood or marriage are applicable to the case of a conveyance by a debtor to a member of his or her family through a third person, the intervention of a stranger or third person affording no ground of distinction.<sup>1</sup> If there is nothing to show that the assets of the debtor have been diminished thereby, a creditor may not successfully attack a transfer of property by a third person to the debtor's spouse or child. A conveyance to the debtor's spouse<sup>2</sup> or child<sup>3</sup> which constitutes a gift from a third person is good as against the debtor's existing creditors, and a similar rule applies as to subsequent creditors.<sup>4</sup> The fact that the debtor may at one time have owned or had an interest in the



property gratuitously conveyed or transferred to the debtor's spouse or child does not give his or her creditors any right therein if the debtor's interest was wholly extinguished before such conveyance or transfer was effected.<sup>5</sup>

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Footnotes

- 1 [Atlas Corp. v. DeVilliers, 447 F.2d 799 \(10th Cir. 1971\).](#)
- 2 [Frame v. Wright, 233 Iowa 394, 9 N.W.2d 364, 147 A.L.R. 1154 \(1943\).](#)
- 3 [Van Riswick v. Spalding, 117 U.S. 370, 6 S. Ct. 788, 29 L. Ed. 913 \(1886\).](#)
- 4 [§ 109.](#)
- 5 [Hopper v. Taylor, 266 Ky. 133, 98 S.W.2d 297 \(1936\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 56

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

## § 56. Transfer by third person to member of debtor's family—Consideration supplied by debtor's spouse

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  95(.5), 95(3)

### A.L.R. Library

[Right of creditors to attack as fraudulent a conveyance by third person to debtor's spouse](#), 35 A.L.R.2d 8

If, in the case of the conveyance of property by a third person to the spouse of a debtor, the spouse supplied the consideration for the purchase of the property from means not derived from the debtor, or if he or she validly purchased in whole or in part upon his or her own credit, title under the conveyance, it is not subject to the claims of existing<sup>1</sup> creditors of the debtor.<sup>2</sup> Nor, under such circumstances, is the spouse's title affected by the fact that a purpose to have the property placed beyond the reach of the debtor's creditors entered into the transaction.<sup>3</sup> His or her title is good as against the debtor spouse's creditors even though the debtor was insolvent at the time or in poor financial condition.<sup>4</sup> However, it has been recognized that this situation is likely to be the means of fraud, and hence, the burden is shifted to the nondebtor spouse to show that he or she in fact paid the consideration out of his or her separate estate.<sup>5</sup>

Where a spouse furnishes only a part of the consideration, he or she is ordinarily protected to that extent as against the existing creditors of his or her spouse.<sup>6</sup>

Footnotes

- 1 As to the rights of subsequent creditors, see § 109.
- 2 [Lee v. Calhoun](#), 202 Ga. 297, 43 S.E.2d 156 (1947).  
Acquisition of property from a third person by a wife, with funds derived from her business, which was gratuitously managed by her insolvent husband as her agent, may not, on that ground alone, be set aside by his creditors. [Childress v. Fidelity & Cas. Co. of N. Y.](#), 194 Va. 191, 72 S.E.2d 349, 35 A.L.R.2d 1 (1952).
- 3 [Buckles v. Waggoner](#), 1947 OK 279, 199 Okla. 626, 188 P.2d 873 (1947).
- 4 [Childress v. Fidelity & Cas. Co. of N. Y.](#), 194 Va. 191, 72 S.E.2d 349, 35 A.L.R.2d 1 (1952).
- 5 [John Silvey & Co. v. Vernon](#), 153 Ala. 570, 45 So. 68 (1907).
- 6 [Jaffe v. Ackerman](#), 279 Mich. 304, 272 N.W. 685 (1937).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 57

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### B. Marriage Settlements; Transfer to Member of Debtor's Family

## § 57. Transfer by third person to member of debtor's family—Consideration furnished by debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  95(.5), 95(2), 95(3)

A purchase of property in the name of a spouse, the consideration being furnished by the other spouse, is prima facie a gift, and hence, the transaction will be considered primarily as having been a voluntary conveyance.<sup>1</sup> As a general rule, a spouse may make a gift to his or her spouse which will be entirely valid as against his or her existing<sup>2</sup> creditors, and may do so by way of a purchase in which the title is taken by the spouse, where no fraud against creditors is intended, and the spouse is and remains solvent notwithstanding the purchase.<sup>3</sup> On the other hand, in several jurisdictions, the broad doctrine has been laid down that title taken by the husband is not good as against the wife's existing creditors if the consideration moved from her.<sup>4</sup> In addition, under statutes in some jurisdictions, if the consideration was paid by the husband, the taking of title by the wife is presumptively fraudulent as to his existing creditors, and under such circumstances, a trust results in favor of such creditors to the extent necessary to satisfy their just demands.<sup>5</sup>

The spouse's existing creditors may reach the purchased property for application on their claims if the consideration moved from such spouse, and he or she was insolvent at the time of the purchase<sup>6</sup> or rendered insolvent by purchase or payment<sup>7</sup> or if he or she was in poor financial circumstances or largely indebted at the time of the purchase.<sup>8</sup> Moreover, where the consideration was provided by the husband and title was taken by the wife with an actual intent to hinder, delay, or defraud the husband's creditors, the property may be reached for application on his existing debts, and the creditors' rights are not dependent on showing the insolvency or financial embarrassment of the husband.<sup>9</sup>

### CUMULATIVE SUPPLEMENT

**Cases:**

Judgment debtor, rather than creditor, bore burden to show that judgment debtor's conveyance of his shares and all of his ownership interest in corporation to his wife in return for nothing was not made to delay, hinder, or defraud creditors. [West's F.S.A. § 56.29\(6\)\(a\)](#). [RREF SNV-FL SSL, LLC. v. Shamrock Storage, LLC](#), 178 So. 3d 90 (Fla. 1st DCA 2015).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 [Reel v. Livingston](#), 34 Fla. 377, 16 So. 284 (1894).
- 2 As to rights of subsequent creditors, see § 109.
- 3 [Fidelity & Cas. Co. of N.Y. v. Kizis](#), 363 Pa. 575, 70 A.2d 227 (1950).
- 4 [David Mayer Brewing Co. v. Sheridan](#), 91 N.J. Eq. 104, 108 A. 366 (Ct. Err. & App. 1919).
- 5 [Jaffe v. Ackerman](#), 279 Mich. 304, 272 N.W. 685 (1937).
- 6 [Thomas v. Burke](#), 146 Fla. 5, 200 So. 69 (1941).
- 7 [Vonville v. Dexter](#), 118 Ind. App. 187, 77 N.E.2d 759 (1948).
- 8 [Kinsley Bank v. Aderhold](#), 131 Kan. 448, 292 P. 798, 76 A.L.R. 1495 (1930).
- 9 [Alt v. Burt](#), 242 S.W.2d 974 (Ky. 1951).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers III C Refs.

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### C. Transactions Relating to Insurance

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  39, 51(4)

### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  39, 51(4)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 58

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### C. Transactions Relating to Insurance

## § 58. Generally; procuring insurance and paying premiums

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  39

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 88](#) (Complaint, petition, or declaration—Action by creditors of insured against designated beneficiary to recover premiums of life insurance policy—Insured's payment of premiums made while insolvent, with intent to defraud creditors)

Recognizing that the head of a family should be able to make provision for his or her family after death, some authorities allow a debtor, even when insolvent, to devote a portion of his or her earnings to purchasing life insurance. Under this rule, the entire proceeds of a policy, the premiums for which have been paid during the insolvency of the insured, are immune from the claims of the insured's creditors if there was no fraudulent intent on his or her part<sup>1</sup> and if the amounts paid for the premiums bear a reasonable relation to the financial condition of the insured.<sup>2</sup> Some exceptions occur when a debtor purchases insurance within one year of filing bankruptcy with the intent to defraud his or her creditors.<sup>3</sup>

Insurance premium payments by a debtor to benefit a spouse constitutes a necessity which will not constitute a fraudulent conveyance.<sup>4</sup> In other jurisdictions, where premiums are paid during insolvency, such payments, although made for the proper benefit of the insured's spouse, constitute constructive fraud of creditors, permitting creditors to recover at least the premiums out of the proceeds of the policy.<sup>5</sup> Moreover, a fraudulent conveyance exists where the debtor admits to creating a family trust to shelter his or her assets and transfers money from the trust to pay the premiums on the debtor's life insurance policies.<sup>6</sup>

However, under a statutory provision to the effect that the amount of any premium upon insurance contracts paid in fraud of creditors "shall inure to their benefit from the proceeds of the contracts," the right of recovery by creditors is postponed until the maturity of the policy.<sup>7</sup>

Generally, although there cannot be a fraudulent conveyance based solely on the fact that an insured cashes in his or her insurance policy, a fraudulent conveyance can occur if, after receiving the money, the insured transfers it to a third party.<sup>8</sup>

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#### Footnotes

- 1 § 59.
- 2 [John Weenink & Sons Co. v. Blahd](#), 73 Ohio App. 67, 28 Ohio Op. 116, 40 Ohio L. Abs. 57, 54 N.E.2d 426 (8th Dist. Cuyahoga County 1943).
- 3 [In re Sayler](#), 98 B.R. 542 (D. Kan. 1989).
- 4 [In re Titus](#), 467 B.R. 592 (Bankr. W.D. Pa. 2012) (applying Pennsylvania law).
- 5 [John Weenink & Sons Co. v. Blahd](#), 73 Ohio App. 67, 28 Ohio Op. 116, 40 Ohio L. Abs. 57, 54 N.E.2d 426 (8th Dist. Cuyahoga County 1943).
- 6 [Huntington Natl. Bank v. Winter](#), 2011-Ohio-1751, 2011 WL 1378727 (Ohio Ct. App. 1st Dist. Hamilton County 2011), appeal not allowed, 129 Ohio St. 3d 1488, 2011-Ohio-5129, 954 N.E.2d 662 (2011).
- 7 [Huntington Natl. Bank v. Winter](#), 2011-Ohio-1751, 2011 WL 1378727 (Ohio Ct. App. 1st Dist. Hamilton County 2011), appeal not allowed, 129 Ohio St. 3d 1488, 2011-Ohio-5129, 954 N.E.2d 662 (2011).
- 8 [Nelson v. Metropolitan Tower Life Ins. Co.](#), 4 F. Supp. 2d 683 (E.D. Ky. 1998).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 59

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### C. Transactions Relating to Insurance

## § 59. Generally; procuring insurance and paying premiums—Intent to defraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  39

Generally, in the absence of a statute providing otherwise, in order to maintain an action in behalf of creditors of the deceased husband against the insurance company to recover back premiums which were paid by him while he was insolvent, the plaintiff must allege and prove fraud.<sup>1</sup> On the other hand, under statutes making premiums paid in fraud of creditors inure to their benefit, the unlawful diversion of property from the insured's creditors which results in hindering, delaying, or defrauding creditors should be regarded as fraudulent in law regardless of actual motive or intention.<sup>2</sup> There is also authority that the purchase of life insurance to protect one's family is not a fraud on creditors within the meaning of such a statute unless an actual fraudulent intent on the part of the insured can be shown.<sup>3</sup> Accordingly, repayment by an insolvent of a loan on his or her life insurance does not affect the exempt character of a policy unless the repayment was made with the intent to defraud creditors.<sup>4</sup>

An intention on the part of a beneficiary of life insurance policies to defraud his or her creditors by electing a mode of settlement with the insurer whereby the proceeds would be shielded from the claims of his or her creditors cannot be inferred from such election where the right so to elect was created by the policy, which had been in force for a period of years before the debt in question was contracted.<sup>5</sup>

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### Footnotes

- <sup>1</sup> Tolman v. Crowell, 288 Mass. 397, 193 N.E. 60 (1934).
- <sup>2</sup> Purvin v. Grey, 294 N.Y. 282, 62 N.E.2d 72 (1945).
- <sup>3</sup> Parks v. Parks' Ex'rs, 288 Ky. 350, 156 S.W.2d 90, 138 A.L.R. 782 (1941).
- <sup>4</sup> Schwartz v. Seldon, 153 F.2d 334, 169 A.L.R. 1375 (C.C.A. 2d Cir. 1945).

5 [Provident Trust Co. v. Rothman, 321 Pa. 177, 183 A. 793, 104 A.L.R. 1275 \(1936\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 60

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### C. Transactions Relating to Insurance

## § 60. Assignment of policy or change of beneficiary

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  39, 51(4)

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 89](#) (Complaint, petition, or declaration—Action to recover proceeds of life insurance policy—Transfer made in the form of change of beneficiary of life insurance policy while debtor insolvent and with intent to defraud creditors)

Because a beneficiary holds only an inchoate interest in an insurance policy, merely changing a beneficiary cannot be considered a conveyance of property capable of being fraudulent.<sup>1</sup> As in the case of the procurement of and payment for insurance,<sup>2</sup> there is a split of authority between jurisdictions holding that a transfer of a policy from the estate of an insured to an individual beneficiary constitutes a conveyance in fraud of creditors<sup>3</sup> and those holding that such a transfer is valid.<sup>4</sup> Of course, where, by virtue of a statute, the proceeds of insurance may not be subjected to the claims of creditors, the insured may transfer the policy from his or her estate to an individual beneficiary within the protected statutory class.<sup>5</sup>

In the case of an insolvent debtor, a transfer of a policy of insurance on the debtor's life payable to him- or herself or the estate may be invalid as in fraud of creditors,<sup>6</sup> and the statute providing that a beneficiary of a life insurance policy is entitled to the proceeds as against creditors applies only to beneficiaries named as such when the policy was originally issued so that where the insured changed the beneficiary from the insured's estate to his or her children while the insured was insolvent, the policy will be held to be part of the estate subject to the claims of creditors.<sup>7</sup>

However, under a statute providing that a designation of beneficiaries of the proceeds of a life insurance policy cannot be set aside as fraudulent on the ground of constructive fraud, the plaintiff cannot succeed except upon a showing of intent to defraud.<sup>8</sup>

It has been held that a change of beneficiary of a life insurance policy without assignment of the policy is not a conveyance capable of being fraudulent except insofar as the cash surrender value is thereby transferred since the change of beneficiary does not put any property out of their reach that the creditors could have reached at the time of the change.<sup>9</sup> Where this rule is followed, the transfer by an insolvent insured of a policy without any cash surrender value does not injure his or her creditors so as to entitle them to have the assignment set aside.<sup>10</sup> Where an insolvent insured, shortly before death apparently by suicide, changed the beneficiary from his estate to his wife, such a change of beneficiary was not subject to attack as having been made in fraud of creditors.<sup>11</sup>

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#### Footnotes

- 1 Wornick v. Gaffney, 544 F.3d 486 (2d Cir. 2008) (applying New York law).
- 2 § 58.
- 3 Union Central Life Ins. Co. v. Flicker, 101 F.2d 857 (C.C.A. 9th Cir. 1939).
- 4 Klebba v. Struempf, 224 Mo. App. 193, 23 S.W.2d 205 (1930).
- 5 Prudential Ins. Co. of America v. Beck, 39 Cal. App. 2d 355, 103 P.2d 241 (1st Dist. 1940).
- 6 Lehman v. Gunn, 124 Ala. 213, 27 So. 475 (1900).
- 7 McCarthy v. Griffin, 299 Mass. 309, 12 N.E.2d 836 (1938).
- 8 Levine v. Grey, 271 A.D. 891, 67 N.Y.S.2d 87 (2d Dep't 1946), judgment aff'd, 296 N.Y. 1018, 73 N.E.2d 725 (1947).
- 9 First Wisconsin Nat. Bank of Milwaukee v. Roehling, 224 Wis. 316, 269 N.W. 677 (1936).
- 10 Union Central Life Ins. Co. v. Flicker, 101 F.2d 857 (C.C.A. 9th Cir. 1939).
- 11 Goren v. Loeb, 124 N.J. Eq. 335, 1 A.2d 861 (Ch. 1938).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers III D Refs.

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76(1), 100(1), 109, 114 to 130, 159(4), 165, 168, 200, 226

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  76(1), 100(1), 109, 114 to 130, 159(4), 165, 168, 200, 226

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 61

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 61. Generally; right of debtor to prefer one creditor over others

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  115

### A.L.R. Library

[Validity of Postnuptial Agreements in Contemplation of Divorce](#), 77 A.L.R.6th 293

### Trial Strategy

[Extent of Community and Separate Interests In Real Property](#), 19 Am. Jur. Proof of Facts 3d 705

[Divorce and Separation: Fraudulent Procurement of Property Settlement](#), 28 Am. Jur. Proof of Facts 2d 663

### Forms

[Am. Jur. Legal Forms 2d §§ 61:79 to 61:117, 139:96 to 139:125](#)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 124](#) (Instructions to jury—Definition of insolvency—Individual debtor)

Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 152 (Instructions to jury—Right of debtor to prefer creditor)

Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 153 (Instructions to jury—Right of debtor to prefer creditor—By full or partial payment)

Am. Jur. Pleading and Practice Forms, Husband and Wife §§ 41 to 53

#### Law Reviews and Other Periodicals

Bodey, *Enforcement of Interspousal Contracts: Out with the "Old Ball & Chain" and in with Marital Equality and Freedom*, 37 Sw. U. L. Rev. 239 (2008)

Williams, *Postnuptial Agreements*, 2007 Wis. L. Rev. 827 (2007)

In the absence of statutory regulation, and subject to certain exceptions, an individual debtor, in applying his or her assets to the discharge or securing of the debtor's obligations, may lawfully prefer one or more creditors to others.<sup>1</sup>

#### Definition:

Generally speaking, "preferences" are monies or property transferred to creditors on the eve of an insolvency petition, which places those creditors in a better position than they would be in if the money or property had not been transferred.<sup>2</sup>

The transfer is not rendered illegal or fraudulent merely because the transferor was insolvent at the time,<sup>3</sup> the transfer contributed to his or her insolvency,<sup>4</sup> or the conveyance exhausted his or her assets.<sup>5</sup> Nor does the fact that the preferred creditor is related necessarily invalidate the transaction.<sup>6</sup> Payment of one creditor in preference to another by the transfer of property is consideration valuable in law, but the value of property transferred may not exceed that reasonably necessary to pay a debt.<sup>7</sup>

As a general rule, whether or not the transfer is deemed to have been fraudulent is a question which involves an inquiry as to the intention of the parties. In order to be sustainable against attack, the preferential transfer must have been executed in good faith,<sup>8</sup> in the absence of a fraudulent intent,<sup>9</sup> with the intent to pay, or to secure payment, of a just indebtedness against him or her.<sup>10</sup> The debt must also be a bona fide and honest one.<sup>11</sup> A debtor's preference of the claim of one creditor to that of another is not of itself a circumstance of suspicion in the absence of fraud.<sup>12</sup> Thus, a debtor who makes a transfer with the intent to hinder, delay, or defraud other creditors<sup>13</sup> not a party to the underlying transaction is not insulated against liability,<sup>14</sup> and an intent to defraud will be found if the circumstances indicate that the main or only purpose of the transfer was to prevent a lawful creditor from collecting a debt.<sup>15</sup>

However, it has also been held that an intent on the part of the transferor to hinder, delay, or defraud other creditors does not invalidate the transfer where such an intent was not known to the transferee.<sup>16</sup> Thus, in some jurisdictions, a debtor may prefer one creditor over another even if the debtor's intentions are spiteful, and the action will delay or prevent the nonpreferred creditor from obtaining payment.<sup>17</sup>

**Caution:**

Funds in a closing agent's escrow account that belong to a lender for the payment of a mortgage are not the agent's assets, and thus, the agent's checks to third parties resulting in overdraft are not preferential transfers because the agent only holds the funds in trust for the lender.<sup>18</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

With one exception, that Minnesota Uniform Fraudulent Transfer Act (MUFTA) treats certain preferential transfers made to insiders as fraudulent, MUFTA does not prohibit a debtor from making a preferential transfer in favor of one bona fide creditor over another, so long as the transfer is not fraudulent. M.S.A. § 513.43(a). [Finn v. Alliance Bank, 860 N.W.2d 638 \(Minn. 2015\)](#).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Valvanis v. Milgroom, 529 F. Supp. 2d 1190, 69 Fed. R. Serv. 3d 474 \(D. Haw. 2007\) \(applying Hawaii law\); Kekona v. Abastillas, 113 Haw. 174, 150 P.3d 823 \(2006\); Town of Southampton v. Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25 \(2d Dep't 2010\); Kaufmann v. Morales, 93 S.W.3d 650 \(Tex. App. Houston 14th Dist. 2002\).](#)
- 2 [Ario v. Ingram Micro, Inc., 600 Pa. 305, 965 A.2d 1194 \(2009\).](#)
- 3 [Manello v. Bornstine, 44 Wash. 2d 769, 270 P.2d 1059, 45 A.L.R.2d 494 \(1954\).](#)
- 4 [In re Michigan Machine Tool Control Corp., 381 B.R. 657 \(Bankr. E.D. Mich. 2008\) \(applying Michigan law\).](#)
- 5 [Workman v. Bryce, 50 Wash. 2d 185, 310 P.2d 228 \(1957\).](#)
- 6 [§ 69.](#)
- 7 [Glenney v. Crane, 352 S.W.2d 773 \(Tex. Civ. App. Houston 1961\), writ refused n.r.e., \(May 16, 1972\).](#)
- 8 [Hoesman v. Sheffler, 886 N.E.2d 622 \(Ind. Ct. App. 2008\).](#)
- 9 [In re Conley, 478 B.R. 803 \(Bankr. W.D. Va. 2003\) \(applying Virginia law; no intent to hinder, delay, or defraud creditors\); Hoesman v. Sheffler, 886 N.E.2d 622 \(Ind. Ct. App. 2008\).](#)
- 10 [Liquidation of MedCare HMO, Inc., 294 Ill. App. 3d 42, 228 Ill. Dec. 502, 689 N.E.2d 374 \(1st Dist. 1997\).](#)
- 11 [Hoesman v. Sheffler, 886 N.E.2d 622 \(Ind. Ct. App. 2008\).](#)
- 12 [S.E.C. v. Whitworth Energy Resources Ltd., 26 Fed. Appx. 723 \(9th Cir. 2002\) \(applying California law\).](#)



- 13                    *Kekona v. Abastillas*, 113 Haw. 174, 150 P.3d 823 (2006).
- 14                    *Aptix Corp. v. Quickturn Design Systems, Inc.*, 148 Fed. Appx. 924 (Fed. Cir. 2005) (applying California law).
- 15                    *Tindall v. H & S Homes, LLC*, 757 F. Supp. 2d 1339 (M.D. Ga. 2011) (applying Georgia law).
- 16                    *Wilkey v. Wax*, 82 Ill. App. 2d 67, 225 N.E.2d 813 (4th Dist. 1967).
- 17                    *Ralfs v. Mowry*, 586 N.W.2d 369 (Iowa 1998).
- 18                    *Union Sav. Bank v. White Family Cos., Inc.*, 167 Ohio App. 3d 51, 2006-Ohio-2629, 853 N.E.2d 1182 (2d Dist. Montgomery County 2006).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 62

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 62. Statutes regulating preferences

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  116

The laws of many jurisdictions do not recognize inequitable preference claims.<sup>1</sup> Indeed, the right to prefer creditors has been affirmed by statute in some states.<sup>2</sup> In other states, there are specific statutory provisions which prohibit preferences in certain circumstances.<sup>3</sup> Such provisions are generally found in the insolvency laws,<sup>4</sup> and note should also be taken of applicable provisions in the Bankruptcy Code.<sup>5</sup>

Preference provisions are intended to discourage creditors from racing to the courthouse to dismember the debtor during his or her slide into bankruptcy.<sup>6</sup> Requirements for avoiding a transfer under a state's preference statute may include that (1) the transfer was made in contemplation of insolvency, and (2) the transfer was made with a design to prefer one or more creditors to the exclusion of others.<sup>7</sup>

In a jurisdiction where the statute does not allow preferences, the garnishment of a debtor's wages is not avoidable, even though the transfer occurs at a time when the debtor is insolvent, where the debtor did not intend that his or her wages be garnished.<sup>8</sup>

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### Footnotes

- <sup>1</sup> [Executive Center III, LLC v. Meieran](#), 823 F. Supp. 2d 883 (E.D. Wis. 2011) (applying Wisconsin law).
- <sup>2</sup> [Aptix Corp. v. Quickturn Design Systems, Inc.](#), 148 Fed. Appx. 924 (Fed. Cir. 2005) (applying California law); [Tindall v. H & S Homes, LLC](#), 757 F. Supp. 2d 1339 (M.D. Ga. 2011) (applying Georgia law).
- <sup>3</sup> [In re Smith Min. and Material, LLC](#), 405 B.R. 589 (Bankr. W.D. Ky. 2009) (applying Kentucky law).

4 As to insolvency laws, generally, see [Am. Jur. 2d, Insolvency §§ 1 et seq.](#)  
5 As to preferential transfers under the Bankruptcy Code, see [Am. Jur. 2d, Bankruptcy §§ 2080 to 2204.](#)  
6 [Ario v. Ingram Micro, Inc., 600 Pa. 305, 965 A.2d 1194 \(2009\).](#)  
7 [In re Smith Min. and Material, LLC, 405 B.R. 589 \(Bankr. W.D. Ky. 2009\) \(applying Kentucky law\).](#)  
8 [In re Smith Min. and Material, LLC, 405 B.R. 589 \(Bankr. W.D. Ky. 2009\) \(applying Kentucky law\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 63

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 63. Right of creditor to accept preference

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  115(1), 117

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 156](#) (Instructions to jury—Right of creditor to accept preference—Where creditor has knowledge of transferor's insolvency)

Where a debtor may lawfully prefer one creditor over another,<sup>1</sup> it naturally follows that a creditor may in good faith accept property from its debtor in payment of a bona fide debt, and such a transfer is not a fraudulent conveyance unless the creditor induces or participates in a fraud on other creditors.<sup>2</sup> The transfer is not subject to attack by reason of knowledge on the part of the transferee that he or she is preferred to other creditors, even if there is a secret agreement to that effect,<sup>3</sup> nor does the transferee lack good faith because the transferee knew his or her debtor's purpose to prefer or because the transferee actively sought the preference.<sup>4</sup> Neither can the transfer be attacked on the ground that the creditor knew that the transferor was insolvent,<sup>5</sup> that the collection of the claims of other creditors would be hindered or defeated,<sup>6</sup> or that the debtor intended to defeat the collection of their claims.<sup>7</sup>

On the other hand, it has been held that a creditor may not lawfully take a conveyance in consideration of terms, express or implied, to further the plans of the debtor to hinder, delay, or defraud other creditors; the acceptance of a conveyance under such circumstances amounts to a participation in the debtor's fraud.<sup>8</sup>

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Footnotes

- 1 §§ 61, 62.
- 2 Wilkey v. Wax, 82 Ill. App. 2d 67, 225 N.E.2d 813 (4th Dist. 1967).
- 3 In re Sharp Intern. Corp., 403 F.3d 43 (2d Cir. 2005) (applying New York law).
- 4 Smith v. Whitman, 39 N.J. 397, 189 A.2d 15 (1963).
- 5 Will v. Tornabells, 217 U.S. 47, 30 S. Ct. 424, 54 L. Ed. 660 (1910); In re Sharp Intern. Corp., 403 F.3d 43 (2d Cir. 2005) (applying New York law).
- 6 Landgraf v. Muchow, 102 S.W.2d 308 (Tex. Civ. App. Galveston 1937).
- 7 Brecheisen v. Clark, 103 Kan. 662, 176 P. 137 (1918).
- 8 Bigby v. Warnock, 115 Ga. 385, 41 S.E. 622 (1902).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 64

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 64. Particular acts and circumstances as fraudulent or as evidence of fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [114](#), [115](#), [119](#) to [130](#)

The reservation of a benefit or interest to the debtor<sup>1</sup> may afford ground for holding that the preference of one creditor over others is illegal.<sup>2</sup> The claim of a creditor, although just, may not be used as a screen to protect the debtor's estate from other creditors.<sup>3</sup> Indeed, a debtor can prefer one creditor over another and make transfers to that end only if the transfer is made in good faith and does not benefit the debtor.<sup>4</sup> To be sustainable, the transfer must have been made solely for the purpose of paying or securing the claim.<sup>5</sup>

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#### Footnotes

- 1 [§ 33.](#)
- 2 [Bamberger v. Schoolfield, 160 U.S. 149, 16 S. Ct. 225, 40 L. Ed. 374 \(1895\).](#)
- 3 [First Nat. Bank v. Brubaker, 128 Iowa 587, 105 N.W. 116 \(1905\).](#)
- 4 [Tindall v. H & S Homes, LLC, 757 F. Supp. 2d 1339 \(M.D. Ga. 2011\) \(applying Georgia law\).](#)
- 5 [U.S. v. Select Meat Co., 275 F. Supp. 38 \(W.D. Tex. 1967\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 65

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 65. Particular acts and circumstances as fraudulent or as evidence of fraud— Transfer to insider by insolvent debtor under Uniform Fraudulent Transfer Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  114, 115, 119

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 32](#) (Complaint—Allegation under Uniform Fraudulent Transfer Act and similar statutes—Transfer to insider of defendant transferor)

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 120](#) (Instructions to jury—Definition of insider—Corporate debtor)

Under the Uniform Fraudulent Transfer Act, a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent.<sup>1</sup>

#### Observation:

Under such a provision, a payment that a debtor made to an oversecured creditor could not be recovered from an insider that allegedly benefited from this payment by reduction of its exposure on a guarantee because the reduction of the insider's guarantee

liability was an incidental consequence of the payment which, by decreasing the extent of the oversecured creditor's lien on the debtor's assets, had potentially benefited, rather than harmed, its unsecured creditors.<sup>2</sup>

The term "insider" is specifically defined in the Act. If a debtor is an individual, an insider includes:<sup>3</sup>

- a relative of the debtor or of a general partner of the debtor;
- a partnership in which the debtor is a general partner;
- a general partner in a partnership described in which the debtor is a general partner; or
- a corporation of which the debtor is a director, officer, or person in control.

If the debtor is a corporation, an insider includes:<sup>4</sup>

- a director of the debtor;
- an officer of the debtor;
- a person in control of the debtor;
- a partnership in which the debtor is a general partner;
- a general partner in a partnership described in which the debtor is a general partner;
- a relative of a general partner, director, officer, or person in control of the debtor.

If the debtor is a partnership, an insider includes:<sup>5</sup>

- a general partner in the debtor;
- a relative of a general partner in, a general partner of, or a person in control of the debtor;
- another partnership in which the debtor is a general partner;
- a general partner in a partnership described in which the debtor is a general partner;
- a person in control of the debtor.

The Act also provides that an insider can be an affiliate, or an insider of an affiliate as if the affiliate were the debtor;<sup>6</sup> or a managing agent of the debtor.<sup>7</sup>

A transfer by a patient, as a hospital's debtor, and his wife of their real property to an adult son was a "preferential transfer" as defined by the applicable provision of the Uniform Fraudulent Transfer Act. The hospital's claim arose before the transfer; the son was an insider; the transfer was in consideration of an antecedent debt; the patient and his wife were insolvent, using the UFTA's balance sheet approach; and the son, who was paying debts for his parents, had reasonable cause to believe they were insolvent.<sup>8</sup>



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Footnotes

- 1 Unif. Fraudulent Transfer Act § 5(b).
- 2 *In re Maine Poly, Inc.*, 317 B.R. 1 (Bankr. D. Me. 2004) (applying Maine law).
- 3 Unif. Fraudulent Transfer Act § 1(7)(i).
- 4 Unif. Fraudulent Transfer Act § 1(7)(ii).
- 5 Unif. Fraudulent Transfer Act § 1(7)(iii).
- 6 Unif. Fraudulent Transfer Act § 1(7)(iv).
- 7 Unif. Fraudulent Transfer Act § 1(7)(v).
- 8 *Prairie Lakes Health Care System, Inc. v. Wookey*, 1998 SD 99, 583 N.W.2d 405 (S.D. 1998).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 66

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 66. Nature and form of transfer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  120

A preference to a creditor may be effectuated by various kinds or forms of transfers. A preference statute applies only to the conveyance of an asset of the debtor.<sup>1</sup> The transfer to the preferred creditor may consist of money<sup>2</sup> or security for a previously unsecured debt.<sup>3</sup> In form, it may be an absolute conveyance,<sup>4</sup> a mortgage,<sup>5</sup> a confession of judgment,<sup>6</sup> or any other sort of transfer of the debtor's assets.<sup>7</sup>

A preference may also be effected indirectly by a transfer of the property by a fraudulent transferee to one or more of the original transferor's creditors in payment of, or as security for, the indebtedness.<sup>8</sup>

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#### Footnotes

- 1 Union Sav. Bank v. White Family Cos., Inc., 167 Ohio App. 3d 51, 2006-Ohio-2629, 853 N.E.2d 1182 (2d Dist. Montgomery County 2006).
- 2 Shibler v. Hartley, 201 Pa. 286, 50 A. 950 (1902).
- 3 Faiella v. Tortolani, 76 R.I. 488, 72 A.2d 434 (1950).
- 4 Sly v. Bell, 131 Iowa 184, 108 N.W. 227 (1906).
- 5 Sleeper v. Wilson, 266 Mich. 218, 253 N.W. 274 (1934).
- 6 Coryell v. Olmsted, 64 Colo. 378, 172 P. 14, 14 A.L.R. 5 (1918).
- 7 Shibler v. Hartley, 201 Pa. 286, 50 A. 950 (1902).
- 8 § 195.

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 67

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 67. Debt or obligation constituting consideration for transfer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  100(1), 121, 226

#### A.L.R. Library

[Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 A.L.R.2d 500](#)

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 91](#) (Complaint, petition, or declaration—Transfer made in form of assignment to pretended creditor with intent to defraud creditors)

A valid preexisting debt is ordinarily sufficient or fair consideration for a preferential transfer<sup>1</sup> so long as the amount of the antecedent debt is not materially less than the property conveyed or encumbered.<sup>2</sup> The transaction will be held to have been fraudulent if indebtedness did not in fact exist.<sup>3</sup>

Where the evidence shows that part of the debt was valid and part fictitious, to the knowledge of the grantee, the entire transfer will be tainted with fraud and void as to other creditors.<sup>4</sup>

An obligation which binds the transferor contingently or secondarily is a good consideration for the conveyance.<sup>5</sup> Thus, the liability of a surety on an unmatured obligation is a lawful debt, claim, or demand which will sustain a transfer to secure the payment thereof.<sup>6</sup>

A debtor may effectually prefer payment of a debt which has become barred by the statute of limitations,<sup>7</sup> and the Uniform Fraudulent Conveyance Act does not exclude a promise to pay a debt barred in part by the statute of limitations if fair consideration is given in good faith by the respective parties.<sup>8</sup>

Some courts have carved out an exception to the rule that preferential payments of preexisting obligations are not fraudulent conveyances: preferences to a debtor corporation's shareholders, officers, or directors are deemed not to be transfers for fair consideration.<sup>9</sup>

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#### Footnotes

- 1 [Capital Distributions Services, Ltd. v. Ducor Exp. Airlines, Inc.](#), 440 F. Supp. 2d 195 (E.D. N.Y. 2006) (applying New York law).
- 2 [First State Bank, Belmont v. Kalkwarf](#), 495 N.W.2d 708 (Iowa 1993).  
As to the amount of debt compared to the value of the property conveyed, see § 68.
- 3 [Klauber v. Schloss](#), 198 Mo. 502, 95 S.W. 930 (1906).
- 4 [Russell v. Davis](#), 133 Ala. 647, 31 So. 514 (1901).
- 5 [Buckwalter Stove Co. v. Edmonds](#), 283 Pa. 236, 128 A. 835 (1925).
- 6 [Buckwalter Stove Co. v. Edmonds](#), 283 Pa. 236, 128 A. 835 (1925).
- 7 [May v. Mathers](#), 233 Ala. 654, 172 So. 907 (1937).
- 8 [U.S. Fidelity & Guaranty Co. v. Postel](#), 64 Cal. App. 2d 567, 149 P.2d 183 (1st Dist. 1944).
- 9 [Capital Distributions Services, Ltd. v. Ducor Exp. Airlines, Inc.](#), 440 F. Supp. 2d 195 (E.D. N.Y. 2006) (applying New York law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 68

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

##### 1. In General

## § 68. Debt or obligation constituting consideration for transfer—Amount of debt compared to value of property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  76(1), 109, 115(1), 121

### A.L.R. Library

[Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 A.L.R.2d 500](#)

It is not fraudulent for a debtor in failing circumstances to prefer one or more of his or her creditors, but the preference is limited to the amount of his or her valid debt.<sup>1</sup> Generally speaking, if the preferential transfer is to be sustained, the value of the property transferred should not be out of reasonable proportion to the amount of the debt paid or secured by the transfer.<sup>2</sup> If the value of the property transferred is out of proportion to the amount of the debt, this will lead the courts to closely scrutinize the facts of the case.<sup>3</sup> If accompanied by other indicia of fraudulent intention, the fact that the property was grossly overvalued may support a conclusion that the transaction was illegal.<sup>4</sup>

Transfers occurring as a result of the lender's repossession and sale of motor vehicles securing the debtor's antecedent debt are not constructively fraudulent as to other creditors where the amount realized by the liquidation of the vehicles is not in excess of the debtor's antecedent debt.<sup>5</sup>

If an insolvent debtor has preferred a creditor by conveying to it property which exceeds in value the amount of the grantee's demand, other creditors may subject the property to payment of their claims to the extent of the excess.<sup>6</sup> The transferee, if shown to have been innocent of any intent to defraud other creditors, will be required to account to other creditors only for the value of the property in excess of the consideration which he or she has paid therefor, but if actual fraudulent intention on his or her part is established, the entire conveyance will be held to be void.<sup>7</sup>

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Footnotes

- 1 [Kekona v. Abastillas](#), 113 Haw. 174, 150 P.3d 823 (2006).
- 2 [Royal Indem. Co. v. McClendon](#), 64 N.M. 46, 323 P.2d 1090 (1958).
- 3 [Kinsella v. Gibson](#), 307 S.W.2d 491 (Mo. 1957).
- 4 [Union Securities Co. v. Smith](#), 93 Wash. 115, 160 P. 304 (1916).
- 5 [In re Chicago Truck Center, Inc.](#), 398 B.R. 266 (Bankr. N.D. Ill. 2008) (applying Illinois law).
- 6 [Garden City Nat. Bank v. Gann](#), 121 Kan. 159, 246 P. 971 (1926).
- 7 [Griswold v. Szwanek](#), 82 Neb. 761, 118 N.W. 1073 (1908).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 69

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

#### 2. Between Relatives

## § 69. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  118

The fact that the preferred creditor is related to the debtor by blood or marriage does not render the transaction invalid, and such a transfer is not subject to attack by other creditors where the evidence shows that the parties acted in good faith.<sup>1</sup> A transfer between related persons is not necessarily fraudulent; there may be financial transactions between family members as between strangers, and if there is "fair consideration," for example, satisfaction of an actual antecedent debt of equal value, the debtor has as much right to prefer a creditor who is a family member as he or she has to prefer any other creditor who is not related.<sup>2</sup> The fact of relationship is, however, a circumstance which may properly be taken into consideration in determining the question of good faith and, under some circumstances, may constitute a badge of fraud or a ground for suspicion as where the debtor is insolvent.<sup>3</sup> Insider preferences by an insolvent transferor, even when made to satisfy valid debts, have been held to lack "good faith" for purpose of the constructive fraud provision of the fraudulent transfer law.<sup>4</sup>

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### Footnotes

- 1 [Johnson v. Lentini](#), 66 N.J. Super. 398, 169 A.2d 208 (Ch. Div. 1961).  
As to validity of transfer where a family relationship exists, see §§ 69, 70.
- 2 [Jahner v. Jacob](#), 252 N.W.2d 1 (N.D. 1977).
- 3 [Berger v. Kraisman](#), 376 Pa. 127, 101 A.2d 717 (1954).
- 4 [In re M. Fabrikant & Sons, Inc.](#), 394 B.R. 721 (Bankr. S.D. N.Y. 2008) (applying New York law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 70

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

### III. Nature and Form of Transfer; Particular Acts and Transactions

#### D. Preferences

#### 2. Between Relatives

## § 70. Preferential transfer to spouse of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  118(2)

### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 158](#) (Instructions to jury—Right of debtor spouse to prefer creditor spouse)

The right to make a preferential transfer is not affected by the fact that the preferred creditor is the wife or husband of the debtor. Accordingly, the transaction will be sustained where the transfer is made in good faith in consideration of a bona fide indebtedness.<sup>1</sup> However, a transaction between husband and wife, giving rise to indebtedness, whereby property of the spouse may be withheld from creditors, excites suspicion and will be scrutinized with care.<sup>2</sup> A debtor-husband may not, under the guise of preferential payment to a creditor, accomplish a transfer without consideration to his spouse to the frustration of his creditors. The preference of a creditor may not be used as a subterfuge for disguising a property transfer to a spouse without consideration.<sup>3</sup>

The fact that the transferor acted in bad faith is immaterial where the transferee had no knowledge thereof,<sup>4</sup> and the fact that the claim had existed during a prolonged period does not of itself invalidate the conveyance in payment of it.<sup>5</sup>

Where a transfer between husband and wife in payment of an antecedent debt is not disproportionate to the property transferred, a finding is justified that the transfer was not fraudulent,<sup>6</sup> but if the difference between the amount of the debt and the value of the property is very great, it may be concluded that the transaction was fraudulent.<sup>7</sup>

**Observation:**

A judgment debtor's transfer of property held in joint tenancy as marital property awarded to his former wife by equitable distribution in a divorce judgment, pursuant to an oral stipulation, is not a fraudulent transfer but rather is a transfer for fair consideration and in good faith where the transfer is incorporated in the divorce decree, and neither the debtor's preference of settling his marital obligations rather than satisfying the judgment nor the former wife's knowledge of the preference constituted a lack of good faith.<sup>8</sup>

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**Footnotes**

- 1 Oetting v. Green, 350 Mo. 457, 166 S.W.2d 548 (1942).
- 2 Sanford, Chamberlain & Albers Co. v. Eubanks, 152 N.C. 697, 68 S.E. 219 (1910).
- 3 Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995).
- 4 Williams v. Harris, 4 S.D. 22, 54 N.W. 926 (1893).
- 5 Dickinson v. Johnson, 110 Ky. 236, 22 Ky. L. Rptr. 1686, 61 S.W. 267 (1901).
- 6 Kummet v. Thielen, 210 Minn. 302, 298 N.W. 245 (1941).
- 7 Lowell-Woodward Hardware Co. v. Davis, 105 Kan. 628, 185 P. 732, 17 A.L.R. 719 (1919).
- 8 Darling v. Darling, 22 Misc. 3d 343, 869 N.Y.S.2d 307 (Sup 2008).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 71

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 71. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  43, 44, 49(.5)

Only the transfers of "assets" are subject to avoidance under the Uniform Fraudulent Transfer Act,<sup>1</sup> and the term "assets," as used in the Act,<sup>2</sup> comprehends any property which is in the debtor's name or the title to which would be vested in the debtor if a fraudulent conveyance were to be set aside.<sup>3</sup> Assets are the debtor's unencumbered, nonexempt equity in property, and the fraudulent transfer of this property may be avoided by a creditor to the extent of its claim.<sup>4</sup> However, even encumbered property may constitute an asset subject to fraudulent conveyance where it is transferred for less than its appraised value, leading to the inference that the transferor was more interested in transferring the property than in obtaining its fair market value.<sup>5</sup> Generally, if the term "asset" does not apply to property that has been conveyed by the insolvent debtor, then there is no "transfer" within the meaning of the Uniform Fraudulent Transfer Act.<sup>6</sup>

Creditors may reach excess salary transfers between spouses,<sup>7</sup> but income that is not yet earned, unless it is subject to levy by a creditor, is not an asset subject to fraudulent conveyance.<sup>8</sup> Personal services that a judgment debtor provides will similarly not provide the basis for finding a fraudulent conveyance.<sup>9</sup> Moreover, a property interest that is subject to being fraudulently conveyed consists of more than a unilateral expectation or abstract need; instead, there must be a legitimate claim of entitlement.<sup>10</sup>

Among interests reached under the fraudulent conveyances statutes have been contingent remainders<sup>11</sup> and inchoate titles in real estate.<sup>12</sup>

#### CUMULATIVE SUPPLEMENT

**Cases:**

A security agreement by the debtor in favor of an alleged transferee is the vehicle for disposing of or parting with an asset or an interest in an asset, and the agreement is not an asset itself under the Uniform Fraudulent Transfer Act (UFTA). [Neb. Rev. Stat. §§ 36-705\(a\)\(1\), 36-706, 36-708](#). [Korth v. Luther](#), 304 Neb. 450, 935 N.W.2d 220 (2019).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 [In re 3dfx Interactive, Inc.](#), 389 B.R. 842 (Bankr. N.D. Cal. 2008) (applying California law).
- 2 [Unif. Fraudulent Transfer Act § 1\(2\)](#).
- 3 [Dorrington v. Jacobs](#), 213 Wis. 521, 252 N.W. 307, 91 A.L.R. 737 (1934).
- 4 [In re Brun](#), 360 B.R. 669 (Bankr. C.D. Cal. 2007) (applying California law).
- 5 [Filip v. Bucurenciu](#), 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (3d Dist. 2005).
- 6 [Rubenstein v. C.I.R.](#), 134 T.C. 266, 2010 WL 2300752 (2010) (applying Florida law).
- 7 [Cadle Co. v. Ogalin](#), 495 F. Supp. 2d 278 (D. Conn. 2007) (applying Connecticut law).
- 8 [Mejia v. Reed](#), 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003).
- 9 [In re Bowers](#), 424 B.R. 594 (Bankr. D. D.C. 2010) (applying District of Columbia law); [In re Fischer](#), 411 B.R. 247 (Bankr. D. Md. 2009) (applying Maryland law); [SMS Financial XV, LLC v. Raquette Lake Camps, Inc.](#), 90 A.D.3d 741, 935 N.Y.S.2d 36 (2d Dep't 2011).
- 10 [In re Bob Nicholas Enterprise, Inc.](#), 358 B.R. 693 (Bankr. S.D. Tex. 2007) (applying Texas law).
- 11 [Francis v. Vastine](#), 229 Ky. 431, 17 S.W.2d 419 (1929).
- 12 [Hollberg v. Spalding County](#), 281 Ga. App. 768, 637 S.E.2d 163 (2006).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 72

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 72. Property of little or no value

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  43, 50

If nothing of value is transferred when property is transferred, or if no obligation is incurred, then there is nothing to avoid and recover and no fraudulent conveyance.<sup>1</sup> Thus, equipment and inventory are excluded from the Uniform Fraudulent Transfer Act's definition of "assets" where the equipment and inventory were fully encumbered at the time of the transfer.<sup>2</sup> Also, the Act does not apply to alleged fraudulent transfers of property to the extent that this property is encumbered by a security interest.<sup>3</sup>

#### Observation:

In determining whether an asset was fraudulently transferred, the value of the transferred asset is determined as of the date of the transfer.<sup>4</sup>

A conveyance of an equity in land which is of little or no value also will not be set aside as fraudulent.<sup>5</sup> To like effect, a debtor's transfer of real property in which he or she holds only bare legal title, such that the debtor has no economic interest in the property, cannot be the basis of an actual fraudulent transfer claim.<sup>6</sup> Nor may a conveyance of property of no value be set aside as fraudulent because of the simultaneous fraudulent conveyance of other property of value even though the conveyances were both part of one transaction.<sup>7</sup> Moreover, a commercial lease is not an "asset" on which a fraudulent conveyance claim may be based where the tenant claims that it was owed significant damages for breach of the lease, and the lease could not have been sold by the debtor to generate a net recovery of money which could then have been used to satisfy the tenant's claim.<sup>8</sup> However,

where the capital stock of a company near insolvency had prospective value and carried control of the company with it, it had sufficient value to warrant setting aside a transfer at a creditor's suit.<sup>9</sup>

If an option has value it is an asset and may be the subject of a fraudulent conveyance; whether it has value depends on the price in relation to value of the property and on the ability of the optionee to meet the terms of the option.<sup>10</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Whether under the Uniform Fraudulent Transfer Act (UFTA) there is a subject of ownership constituting property that can be an asset depends on a legitimate and identifiable claim of entitlement. [Neb. Rev. Stat. §§ 36-705\(a\)\(1\), 36-706, 36-708](#). [Korth v. Luther](#), 304 Neb. 450, 935 N.W.2d 220 (2019).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [In re M. Silverman Laces, Inc.](#), 404 B.R. 345 (Bankr. S.D. N.Y. 2009) (applying New Jersey law).
- 2 [Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.](#), 87 Ohio App. 3d 644, 622 N.E.2d 1113, 23 U.C.C. Rep. Serv. 2d 170 (10th Dist. Franklin County 1993).
- 3 [In re SMTC Mfg. of Texas](#), 421 B.R. 251 (Bankr. W.D. Tex. 2009) (applying Texas law).
- 4 [Doyle v. Kontemporary Builders, Inc.](#), 370 S.W.3d 448 (Tex. App. Dallas 2012), reh'g overruled, (June 6, 2012) and review denied, (Oct. 19, 2012).
- 5 [Stokes Coal Co. v. Garguilo](#), 255 A.D. 281, 7 N.Y.S.2d 414 (1st Dep't 1938), judgment aff'd, 280 N.Y. 616, 20 N.E.2d 562 (1939).
- 6 [In re Todd](#), 391 B.R. 504 (Bankr. S.D. Fla. 2008) (applying Florida law).
- 7 [Glover v. Berger](#), 75 Wyo. 191, 294 P.2d 793, 60 A.L.R.2d 583 (1956).
- 8 [Dollar Tree Stores Inc. v. Toyama Partners LLC](#), 2012 WL 2395198 (N.D. Cal. 2012) (applying California law).
- 9 [Carstens v. Morck](#), 159 Wash. 129, 292 P. 262 (1930).
- 10 [Marsh v. Galbraith](#), 31 Tenn. App. 482, 216 S.W.2d 968 (1948).

## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 73

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 73. Property held by transferor as trustee, agent, or custodian

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  43, 44, 49(1)

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 108](#) (Answer—Defense—Property transferred by transferor spouse purchased from separate estate of transferee spouse)

A transfer of property by a debtor who is merely acting as a medium for the transfer of title from a third person to the grantee does not constitute a fraudulent conveyance.<sup>1</sup> In other words, funds held in trust by a debtor cannot be considered the debtor's assets, and therefore, transfer of the funds in the trust cannot be fraudulent.<sup>2</sup> Thus, a transfer of property to the true owner by one who has the bare legal title is not fraudulent as to the latter's creditors.<sup>3</sup> Likewise, a transfer of the legal title to the beneficial owner is not a fraudulent conveyance as to the transferor's creditors.<sup>4</sup> Nor is a conveyance in accordance with an oral trust ordinarily fraudulent as to creditors of the trustee.<sup>5</sup> Accordingly, a transfer by a husband to his wife of property which belongs to her legally or equitably is not fraudulent as to his creditors.<sup>6</sup> This rule applies particularly where the evidence shows that the property which was conveyed by the husband to his wife had been purchased by him with money belonging to her separate estate.<sup>7</sup>

However, funds transferred by Chapter 11 debtors to the Internal Revenue Service for income taxes allegedly owed by the debtors' employee due to the employee's exercise of employee stock options are not considered statutory trust funds, and therefore, such funds belonged to the debtors and are potentially recoverable under state fraudulent transfer causes of action.<sup>8</sup>

Footnotes

- 1 Mullens v. Frazer, 134 W. Va. 409, 59 S.E.2d 694, 24 A.L.R.2d 380 (1950).
- 2 Union Sav. Bank v. White Family Cos., Inc., 167 Ohio App. 3d 51, 2006-Ohio-2629, 853 N.E.2d 1182 (2d Dist. Montgomery County 2006).
- 3 Kummet v. Thielen, 210 Minn. 302, 298 N.W. 245 (1941).
- 4 Kummet v. Thielen, 210 Minn. 302, 298 N.W. 245 (1941).
- 5 Perkins v. Hilton, 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952).
- 6 Wallace v. Kilbride, 319 F.2d 760 (3d Cir. 1963).
- 7 Wallace v. Kilbride, 319 F.2d 760 (3d Cir. 1963).
- 8 In re U.S. Wireless Corp., 333 B.R. 688 (Bankr. D. Del. 2005) (applying Delaware law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 74

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 74. Exempt property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  51

A debtor's transfer of an interest in property that is exempt cannot be fraudulent as to creditors.<sup>1</sup> Thus, the sale, gift, or other disposition of property that is by law absolutely exempt from payment of the owner's debts cannot be impeached by creditors as in fraud on their rights.<sup>2</sup> The Uniform Fraudulent Transfer Act also recognizes that exempt property does not constitute an "asset" of the debtor and thus cannot be the subject of a fraudulent conveyance.<sup>3</sup>

A transfer of exempt property is not subject to attack, even though the transferor acted with fraudulent intention,<sup>4</sup> and the transferee had knowledge thereof,<sup>5</sup> nor does any importance attach to the fact that consideration for the conveyance was lacking.<sup>6</sup> Generally, the transferor is not estopped from claiming the property as exempt from seizure under execution where the transferee asserts no claim to it, and other parties have in no way been prejudiced or affected by the sham sale and are claiming no right under or by virtue of it.<sup>7</sup>

Exempt funds withdrawn from the debtor's retirement account and deposited into a checking account<sup>8</sup> and transfers of exempt property to other exempt property,<sup>9</sup> as well as Social Security benefits<sup>10</sup> are not "assets" and cannot be subject to a fraudulent transfer.

These rules apply most commonly to homestead exemptions<sup>11</sup> but apply also to exempt personal property, such as exempted wages or earnings,<sup>12</sup> exempted pension money,<sup>13</sup> and life insurance policies and their proceeds.<sup>14</sup> Under a statute providing that payments under a prearranged funeral plan remain trust funds until the death of the person whose funeral is so provided for, or until funds are sooner released upon the demand of the person making the payments, such amounts on deposit are exempt even though the cost of the burial is thereby in effect shifted to the creditors of the deceased.<sup>15</sup>

Moreover, to the extent that the debtor's settlement proceeds are arguably exempt, the debtor may use these exempt proceeds to purchase exempt homestead property in the name of the debtor's spouse, and the transaction would not constitute a fraudulent conveyance.<sup>16</sup>

Where a conveyance includes both exempt and nonexempt property, creditors of the transferor may reach the nonexempt property if the conveyance is fraudulent to them.<sup>17</sup>

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#### Footnotes

- 1 In re Jones, 403 B.R. 228 (Bankr. D. Conn. 2009) (applying Connecticut law); In re Porras, 312 B.R. 81 (Bankr. W.D. Tex. 2004) (applying Texas law); Goebel v. Brandley, 174 S.W.3d 359 (Tex. App. Houston 14th Dist. 2005).
- 2 In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007) (applying Florida law).
- 3 Unif. Fraudulent Transfer Act § 1(2)(ii).
- 4 Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995).
- 5 Hobson v. Noel, 30 Ky. L. Rptr. 1, 97 S.W. 388 (Ky. 1906).
- 6 Morse v. Andrews, 112 Vt. 456, 28 A.2d 393 (1942).
- 7 § 80.
- 8 In re Titus, 467 B.R. 592 (Bankr. W.D. Pa. 2012) (applying Pennsylvania law).
- 9 In re Mathews, 360 B.R. 732 (Bankr. M.D. Fla. 2007) (applying Florida law).
- 10 Prestige Caterers, Inc. v. Siegel, 88 A.D.3d 679, 930 N.Y.S.2d 272 (2d Dep't 2011).
- 11 § 75.
- 12 Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182, 7 A.L.R.2d 1099 (1949).
- 13 Falkenburg v. Johnson, 102 Ky. 543, 19 Ky. L. Rptr. 1606, 44 S.W. 80 (1898).
- 14 § 58.
- 15 Grant County Service Bureau, Inc. v. Treweek, 19 Wis. 2d 548, 120 N.W.2d 634 (1963).
- 16 In re Meyer, 392 B.R. 416 (Bankr. N.D. Iowa 2008) (applying Iowa law).
- 17 As to conversion of nonexempt into exempt property, see § 41.  
Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 75

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 75. Exempt property—Homestead

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  52

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 109](#) (Answer—Defense—Property transferred by transferor spouse exempt as homestead)

On the ground that a homestead is exempt from the claim of creditors, it is the general rule that the conveyance of a homestead cannot be a fraud on creditors.<sup>1</sup> In accordance with the rules applying to exempt property, generally,<sup>2</sup> such conveyances are considered valid regardless of the motive with which they were made.<sup>3</sup>

The Uniform Fraudulent Transfer Act's exclusion of exempt property<sup>4</sup> from its description of assets that are subject to fraudulent conveyance is intended to include the exemption applicable to a dwelling under the homestead exemption.<sup>5</sup>

A fraudulent transfer which includes property in excess of the homestead exemption is, according to some authorities, to be set aside in toto so as to divest the grantee of the homestead property while permitting the grantor to assert the grantor's exemption against his or her creditors.<sup>6</sup> However, the transfer of a homestead cannot be avoided as fraudulent to creditors absent a showing that, at the time of the transfer, the property had a value in excess of the sum of the encumbrances against it and the homestead exemption to which the debtor was entitled.<sup>7</sup> According to other authorities, the conveyance is to be treated as valid as to the homestead while voidable as to the excess.<sup>8</sup> Under either line of reasoning, the authorities agree that the excess may be subjected to the claims of the grantor's creditors.<sup>9</sup>

When the proceeds from property fraudulently obtained find their way into a homestead for the purposes of seclusion, the right of a creditor thus defrauded may become paramount to that of the owner of the homestead, dependent on the facts of the case. Thus, a homestead may be successfully attacked by a creditor where money fraudulently obtained from it is invested in and constitutes part of the homestead.<sup>10</sup> Thus, the conveyance of a homestead, bought with wrongfully obtained funds before being conveyed to an insider for no consideration, is fraudulent even though the property is homestead.<sup>11</sup> Indeed, the homestead exemption was intended to protect the homesteader and his or her dependents in enjoyment of the domicile, not property the homesteader fraudulently transfers to avoid the legal consequences of a wrongful act.<sup>12</sup>

As to situations in which the United States seeks to avoid a transfer as fraudulent to collect unpaid tax liabilities, homestead property is not generally exempt under nonbankruptcy law within the meaning of the Uniform Fraudulent Transfer Act, and consequently, the property is an asset that may be fraudulently conveyed.<sup>13</sup>

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#### Footnotes

- 1 [In re Roca](#), 404 B.R. 531 (Bankr. D. Ariz. 2009), as amended, (Apr. 17, 2009) (applying Arizona law and involving transfer of the debtor's joint tenancy interest in homestead); [Fidelity Nat. Title Ins. Co. v. Schroeder](#), 179 Cal. App. 4th 834, 101 Cal. Rptr. 3d 854 (5th Dist. 2009); [McCone County Federal Credit Union v. Gribble](#), 2009 MT 290, 352 Mont. 254, 216 P.3d 206 (2009); [Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc.](#), 366 S.W.3d 800 (Tex. App. Dallas 2012).
- 2 § 74.
- 3 [Hall Roberts' Son, Inc. v. Plaht](#), 253 Iowa 862, 114 N.W.2d 548 (1962).
- 4 Unif. Fraudulent Transfer Act § 1(2)(ii).
- 5 [In re Jones](#), 403 B.R. 228 (Bankr. D. Conn. 2009) (applying Connecticut law); [Fidelity Nat. Title Ins. Co. v. Schroeder](#), 179 Cal. App. 4th 834, 101 Cal. Rptr. 3d 854 (5th Dist. 2009); [McCone County Federal Credit Union v. Gribble](#), 2009 MT 290, 352 Mont. 254, 216 P.3d 206 (2009).
- 6 [Hamner v. Freeman](#), 181 Ala. 109, 61 So. 106 (1913).
- 7 [In re Jones](#), 403 B.R. 228 (Bankr. D. Conn. 2009) (applying Connecticut law); [Fidelity Nat. Title Ins. Co. v. Schroeder](#), 179 Cal. App. 4th 834, 101 Cal. Rptr. 3d 854 (5th Dist. 2009).
- 8 [Rand v. Rodgers](#), 191 Mich. 465, 158 N.W. 108 (1916).
- 9 [Hall Roberts' Son, Inc. v. Plaht](#), 253 Iowa 862, 114 N.W.2d 548 (1962).
- 10 [Nicolos v. Grover](#), 186 Cal. App. 3d 858, 231 Cal. Rptr. 79 (1st Dist. 1986).
- 11 [Casterline v. Roberts](#), 168 Wash. App. 376, 284 P.3d 743 (Div. 2 2012) (applying Washington law).
- 12 [Casterline v. Roberts](#), 168 Wash. App. 376, 284 P.3d 743 (Div. 2 2012) (applying Washington law).
- 13 [Rubenstein v. C.I.R.](#), 134 T.C. 266, 2010 WL 2300752 (2010) (applying Florida law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 76

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### IV. Property Which May Be Subject of Fraudulent Transfer

### § 76. Community property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  43(2), 44, 57(5)

A spouse who is solvent may lawfully transfer to a spouse his or her interest in community property.<sup>1</sup> Conversely, a debtor may not make a voluntary conveyance of community property to his or her spouse unless the debtor has property sufficient to pay his or her existing debts.<sup>2</sup>

A statute which voids a gratuitous transfer of property as to an existing creditor unless at the time of the transfer the debtor has enough property in the state subject to execution to pay all of his existing debts did not void a husband's gift of his life insurance proceeds to his wife, notwithstanding the fact that at the time of the husband's death the community estate was insolvent, where there was no contention that the community estate was insolvent on or before the date the wife was designated a beneficiary.<sup>3</sup>

However, where community property is subject to the claims of community creditors only, a transfer of community property from one spouse to another is not evidence of fraud as to the separate creditors of the transferor.<sup>4</sup> Moreover, community property conveyed in fraud of a spouse's judgment creditor remains community property in the hands of the transferee and can be reached by the judgment creditor.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Speed v. Gilliland](#), 31 S.W.2d 519 (Tex. Civ. App. Amarillo 1930), writ dismissed w.o.j., (Dec. 20, 1930).  
As to conveyance by debtor of property held by an estate by the entirety, see [§ 44](#).
- <sup>2</sup> [Maddox v. Summerlin](#), 92 Tex. 483, 49 S.W. 1033 (1899).
- <sup>3</sup> [Pope Photo Records, Inc. v. Malone](#), 539 S.W.2d 224 (Tex. Civ. App. Amarillo 1976).
- <sup>4</sup> [Deering v. Holcomb](#), 26 Wash. 588, 67 P. 240 (1901).

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[Brunvold v. Victor Johnson & Co., 59 Cal. App. 2d 75, 138 P.2d 32 \(1st Dist. 1943\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers V A Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1.5, 17 to 22, 172(1), 177, 181(1), 205, 207 to 210, 224, 225

#### A.L.R. Library

A.L.R. Index, Fraudulent Conveyances

West's A.L.R. Digest, [Fraudulent Conveyances](#)  1.5, 17 to 22, 172(1), 177, 181(1), 205, 207 to 210, 224, 225

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 77

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

### § 77. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  172(1), 181(1), 205

The courts are not in complete agreement as to the effect of a conveyance or transfer which is shown to have been within the purview of a fraudulent conveyance statute. The early statutes and many of those which have been patterned after them declared that the prohibited conveyance should be "void"; and if this language were to be taken literally, the consequence would be to render the transaction invalid and ineffectual not only as to persons who have been defrauded but also as to strangers and even the transferor.<sup>1</sup> The Uniform Fraudulent Transfer Act<sup>2</sup> and the Uniform Fraudulent Conveyance Act,<sup>3</sup> on the other hand, do not expressly state that a conveyance shall be "void," providing merely that certain conveyances are "fraudulent." The courts have generally held that a voluntary or fraudulent conveyance is valid between the parties<sup>4</sup> and in fact as to the whole world except those within the protection of the statutes. The word "void" in the statutes has ordinarily been construed to mean "voidable" and "voidable" only at the instance and option of those who are within the meaning of the expression "creditors and others" or "purchasers."<sup>5</sup> Hence, even as against creditors, the generally prevailing view is that a fraudulent conveyance is merely voidable at their option<sup>6</sup> though this approach is not universally accepted, and at least one court has found that fraudulent transfers are void as to creditors.<sup>7</sup> The statement that a fraudulent transfer is void as to creditors generally means that the rights of creditors are not affected by the transfer; that creditors may, notwithstanding the transfer, avail themselves of all remedies for collecting their debts out of the property or its avails; and that in pursuing those remedies they may treat the property as though the transfer had not been made—that is, as the property of the debtor.<sup>8</sup> The conveyance will be ineffectual as to the transferor's creditors only to the extent that may be necessary in order that the debts may be paid.<sup>9</sup> Moreover, a fraudulent transfer of property does not affect the amount of any lien on the property.<sup>10</sup>

However, the issue of voidability and void transactions has been analyzed differently by other courts. In one jurisdiction, the court observed that there was no indication in the Act's language or in its legislative history that the state legislature intended to change the common law and establish fraudulent transfers in general as voidable instead of void. Following the Act's enactment,



courts and other authorities continue to recognize that a creditor has cumulative remedies with respect to a fraudulent transfer as discussed herein.<sup>11</sup>

A transferor retains equitable ownership of assets that are fraudulently transferred to a third party, and those assets remain subject to attachment by the transferor's creditors.<sup>12</sup> Indeed, legal title to property involved in a fraudulent conveyance, insofar as the judgment creditor is concerned, may never pass from the grantor.<sup>13</sup> However, it has also been held that when a conveyance of property is found to be fraudulent, legal, as well as equitable, title remains with the debtor relative to a defrauded creditor.<sup>14</sup> It has further been held that as between the parties to the transfer, a conveyance made in fraud of creditors passes title to the vendee and is defeasible only at the instance of the creditors.<sup>15</sup>

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#### Footnotes

- 1 [Catron v. Bostic](#), 123 Va. 355, 96 S.E. 845 (1918).
- 2 [Unif. Fraudulent Transfer Act §§ 4, 5](#).
- 3 [Unif. Fraudulent Conveyance Act §§ 4 to 8](#).
- 4 [§ 82](#).
- 5 [Rollie v. Bethke](#), 71 N.D. 208, 299 N.W. 303 (1941).
- 6 [Hyman v. Landry](#), 135 Wis. 598, 116 N.W. 236 (1908).
- 7 [In re Cass](#), 476 B.R. 602 (Bankr. C.D. Cal. 2012) (applying California law).
- 8 [Gerry v. Northrup](#), 102 Cal. App. 2d 449, 227 P.2d 857 (2d Dist. 1951).
- 9 [Stierlin v. Teschemacher](#), 333 Mo. 1208, 64 S.W.2d 647, 91 A.L.R. 121 (1933).
- 10 [U.S. v. Verduchi](#), 434 F.3d 17 (1st Cir. 2006).
- 11 [In re Cass](#), 476 B.R. 602 (Bankr. C.D. Cal. 2012) (applying California law).
- 12 [In re Krause](#), 637 F.3d 1160 (10th Cir. 2011) (applying Kansas law).
- 13 [In re Broward Kitchens & Baths, Inc.](#), 429 B.R. 350 (Bankr. S.D. Fla. 2010) (applying Florida law).
- 14 [Mladenka v. Mladenka](#), 130 S.W.3d 397 (Tex. App. Houston 14th Dist. 2004).
- 15 [In re Estate of LaValle](#), 218 S.W.3d 834 (Tex. App. Beaumont 2007).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 78

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

### § 78. When transfer occurs under Uniform Fraudulent Transfer Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  172(1), 181(1), 205

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 116](#) (Instructions to jury—Definition of incurring of obligation)

The Uniform Fraudulent Transfer Act provides that a transfer is made with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.<sup>1</sup> With respect to an asset that is not real property or that is a fixture, a transfer is made when it is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under the Act that is superior to the interest of the transferee.<sup>2</sup> If the applicable law permits the transfer to be perfected as provided above and the transfer is not so perfected before the commencement of an action for relief under the Act, the transfer is deemed made immediately before the commencement of the action.<sup>3</sup> On the other hand, if the applicable law does not permit the transfer to be perfected as provided above, the transfer is made when it becomes effective between the debtor and the transferee.<sup>4</sup> Furthermore, a transfer is not made until the debtor has acquired rights in the asset transferred.<sup>5</sup> An obligation is incurred, if oral, when it becomes effective between the parties or, if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.<sup>6</sup>

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Footnotes

- 1                   Unif. Fraudulent Transfer Act § 6(1)(i).
- 2                   Unif. Fraudulent Transfer Act § 6(1)(ii).
- 3                   Unif. Fraudulent Transfer Act § 6(2).
- 4                   Unif. Fraudulent Transfer Act § 6(3).
- 5                   Unif. Fraudulent Transfer Act § 6(4).
- 6                   Unif. Fraudulent Transfer Act § 6(5).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 79

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

### § 79. Validity as affected by subsequent acts or conduct

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [17](#), [22](#), [177](#), [207](#) to [210](#), [224](#)

If the intent of the parties at the time of the transfer of the property appears to have been honest and lawful, the transaction cannot be held to have been fraudulent or illegal because of subsequent acts or conduct.<sup>1</sup> On the other hand, a fraudulent transaction may be purged of fraud by the subsequent action of the parties.<sup>2</sup> Thus, a voluntary conveyance may become valid, and even a fraudulent grant may be purged of the fraud, by matter ex post facto, whereby the fraudulent intent is abandoned and the grant confirmed for a good and valuable consideration.<sup>3</sup> The fact that a debtor who has transferred property in trust for him- or herself for the purpose of defrauding creditors purges the fraud by payment of all debts has been held to have a bearing in equity, along with other facts, in determining whether the trust should be enforced.<sup>4</sup> However, some authorities hold that in order to purge the transaction of fraud, the acts of the parties must be such as in effect to constitute a new conveyance.<sup>5</sup> If there was fraud on the part of both grantor and grantee, the conveyance is not validated by the grantee's subsequently paying full consideration where the payment of consideration at the time of the conveyance would not have taken it out of the statutes, and there must, in addition, be an entire abandonment of the fraudulent purpose.<sup>6</sup>

A fraudulent conveyance may also be rendered valid by the subsequent assent of the creditors entitled to avoid it.<sup>7</sup>

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#### Footnotes

- 1 [Peoples State Bank v. Merry "A" Drilling, Inc.](#), 204 Kan. 192, 460 P.2d 521 (1969).
- 2 [Sahley v. Tipton Co.](#), 264 F. Supp. 653 (D. Del. 1967), judgment aff'd, 386 F.2d 450 (3d Cir. 1967).
- 3 [Taylor v. Collins & Taylor](#), 222 Ky. 61, 299 S.W. 1097 (1927).  
As to the reconveyance or restoration of the property by the transferee, generally, see §§ [114](#), [115](#).

- 4                      Wantulok v. Wantulok, 67 Wyo. 22, 214 P.2d 477, 21 A.L.R.2d 572 (1950).  
5                      Caldwell v. Walker, 76 Miss. 879, 25 So. 929 (1899).  
6                      Spuck v. Logan, 97 Md. 152, 54 A. 989 (1903).  
7                      Rollie v. Bethke, 71 N.D. 208, 299 N.W. 303 (1941).  
                        As to estoppel of creditors, see § 80.

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 80

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

### § 80. Estoppel to assert invalidity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  225

A fraudulent donor, vendor, grantor, or mortgagor will not be permitted to set up his or her own iniquity to avoid his or her own act or deed as against the donee, vendee, or grantee<sup>1</sup> or as against others who have relied thereon in good faith.<sup>2</sup> However, the transferor is not estopped from claiming the property as exempt from seizure under execution where the transferee asserts no claim to it, and other parties have in no way been prejudiced or affected by the sham sale and are claiming no right under or by virtue of it.<sup>3</sup>

A creditor who ratifies or participates in a fraudulent transfer may be estopped from attacking the transfer.<sup>4</sup> However, a creditor, by claiming a surplus arising from the foreclosure of a deed of trust, will not be estopped from questioning its validity on the ground that it was made in fraud of creditors when the objection is raised by one who was a party to the fraud.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> § 83.
- <sup>2</sup> *Sewell v. Norris*, 128 Ga. 824, 58 S.E. 637 (1907).
- <sup>3</sup> *Sannoner v. King*, 49 Ark. 299, 5 S.W. 327 (1887).
- <sup>4</sup> *In re Adelphia Recovery Trust*, 634 F.3d 678 (2d Cir. 2011); *U.S. Bank Nat. Ass'n v. Verizon Communications Inc.*, 479 B.R. 405 (N.D. Tex. 2012).
- <sup>5</sup> *Reyburn v. Mitchell*, 106 Mo. 365, 16 S.W. 592 (1891).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 81

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### A. In General

### § 81. What law governs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  1.5

A fraudulent conveyance claim is governed by the law of the state in which the property is located.<sup>1</sup> In the case of personal property, the law of the situs of the property transferred controls as to the validity of transfers of such property alleged to be fraudulent as to the creditors of the transferor.<sup>2</sup> However, the law of the place where an instrument transferring title to property was delivered, and not that of the situs of the property transferred, governs in determining whether the courts of the state where the transfer was made will require the transferees to reconvey the property or pay damages on the ground that the transfer was an illegal preference.<sup>3</sup> In the case of realty, whether a conveyance of land is in fraud of creditors is determined by the law of the state where the land is situated.<sup>4</sup>

It has alternatively been held that, because fraudulent conveyances statutes regulate conduct, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders, and parties engaging in those activities would have a reasonable expectation that their activities would be governed by the law of the state in which they are located and reside.<sup>5</sup> It has also been held that one state's choice-of-law rules suggest that a district court focus on the factors which capture the parties' more qualitative relationship in the context of a fraudulent transfer dispute in order to determine the applicable law.<sup>6</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Strong-arm proceeding to avoid, as constructively fraudulent to creditors, payments that bankrupt American manufacturer of plug-in hybrid cars made using funds provided through a United States Department of Energy loan program to German

company which was to perform development work for debtor-manufacturer in Germany and to deliver its work in Germany in exchange for payments by debtor-manufacturer in euros could only be brought pursuant to German fraudulent transfer law, whose "lookback" period did not exceed two-year "lookback" period of bankruptcy fraudulent transfer statute, as Germany had most significant relationship with transfers at issue; mere fact that most of the creditors harmed by transfers were located in the United States was insufficient, even in combination with fact that transferred funds originated in the United States, to permit bankruptcy court to apply non-German law. 11 U.S.C.A. § 544. *In re FAH Liquidating Corp.*, 572 B.R. 117 (Bankr. D. Del. 2017).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 [In re Jones](#), 403 B.R. 228 (Bankr. D. Conn. 2009).
- 2 [Royal Baking Powder Co. v. Hessey](#), 76 F.2d 645 (C.C.A. 4th Cir. 1935).
- 3 [Irving Trust Co. v. Maryland Casualty Co.](#), 83 F.2d 168, 111 A.L.R. 781 (C.C.A. 2d Cir. 1936).
- 4 [First Nat. Bank v. Henderson](#), 187 Ala. 285, 65 So. 949 (1914).
- 5 [Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC](#), 842 F. Supp. 2d 661 (S.D. N.Y. 2012) (applying New York law); [Atsco Ltd. v. Swanson](#), 29 A.D.3d 465, 816 N.Y.S.2d 31 (1st Dep't 2006).
- 6 [ASARCO LLC v. Americas Min. Corp.](#), 382 B.R. 49 (S.D. Tex. 2007), on reconsideration in part, 396 B.R. 278 (S.D. Tex. 2008).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 82

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

###### 1. In General

### § 82. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  173.1, 174(1)

A fraudulent conveyance is legal and valid as between the parties<sup>1</sup> and can be enforced in all of its terms as any other contract.<sup>2</sup> While a judgment in favor of a creditor in a fraudulent conveyance action sets aside the conveyance between the grantor and the grantee insofar as it affects the creditor, it does not set it aside as to the grantor; as between the creditor and the grantee, the conveyance is ineffective, but as between the grantor and the grantee, the conveyance remains in full effect.<sup>3</sup> Thus, as between a fraudulent grantor and fraudulent grantee, it is the fraudulent grantee who is entitled to any excess in the property over and above the amount necessary to satisfy the creditors.<sup>4</sup> Even as against creditors, the generally prevailing view is that a fraudulent conveyance is merely voidable at their option,<sup>5</sup> and hence, unless they protect themselves by pursuing the prescribed course by which alone the property can be made available for the satisfaction of debts, the transaction will be treated as valid.<sup>6</sup>

#### Observation:

There is no cause of action under the Uniform Fraudulent Transfer Act against a party who assists or aids and abets a fraudulent transfer where that party does not come into possession of the property.<sup>7</sup>

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Footnotes

- 1 [Schaefer v. Schaefer](#), 795 N.W.2d 494 (Iowa 2011).
- 2 [Hair v. Schellenberger](#), 966 N.E.2d 693 (Ind. Ct. App. 2012), transfer denied, 975 N.E.2d 360 (Ind. 2012).  
An executed contract made for the purpose of defrauding creditors is valid and binding between the parties.  
[Jordan v. Jordan](#), 313 Ga. App. 189, 721 S.E.2d 119 (2011), cert. denied, (Apr. 24, 2012).
- 3 [Patterson v. Missler](#), 238 Cal. App. 2d 759, 48 Cal. Rptr. 215 (4th Dist. 1965).
- 4 [McMahan v. Texas & N. O. R. Co.](#), 138 Tex. 626, 161 S.W.2d 70 (Comm'n App. 1942).
- 5 § 77.
- 6 [Beavans v. Groff](#), 211 Ind. 85, 5 N.E.2d 514, 108 A.L.R. 694 (1937).
- 7 [Super Vision Intern., Inc. v. Mega Intern. Commercial Bank Co., Ltd.](#), 534 F. Supp. 2d 1326 (S.D. Fla. 2008) (applying Florida law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 83

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 83. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  174(1)

#### A.L.R. Library

[Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 A.L.R.4th 862](#)

As a general rule, neither the fraudulent transferor nor the fraudulent transferee may claim relief from the consequences thereof. The law will leave them in the position in which they have placed themselves, refusing affirmative aid to either of the fraudulent participants.<sup>1</sup> This rule prevents the transferor from recovering the title fraudulently conveyed to a third party because a fraudulent transferor should not be allowed to benefit from his or her own misdeeds.<sup>2</sup> Thus, a person who fraudulently conveys property to avoid the reach of creditors is at the grantee's mercy as to whether he or she will ever get the property back.<sup>3</sup> The general rule applies not only to the original parties to the fraudulent transaction but also to their heirs and all other persons claiming under them, no equitable rights having intervened to protect the complainant.<sup>4</sup>

The equitable maxim, "he who comes into equity must come with clean hands," generally governs the court's action in these circumstances.<sup>5</sup> However, the well-established rule that a grantor conveying property with intent to hinder, delay, or defraud his or her creditors cannot obtain the assistance of equity to obtain a reconveyance, based upon the so-called doctrine of "clean hands," in some decisions is subject to exceptions on the principle that the "clean hands" maxim will not be applied where it

will work an injustice.<sup>6</sup> The reluctance of a court of equity to aid in the recovery by a grantor of property conveyed to defraud creditors may be overcome by the combination of circumstances of the particular case, such as the nature of the debt, the nature of the fraud, the efforts of the grantor to purge the fraudulent conduct and the creditors' response, the right of the grantor to the return of the interest in the property, the retention of possession and control of the property by the grantor without any adverse claim of the grantee, the possibility of the grantor becoming a public charge upon denial of return of the property, and the attempt of the grantee to perpetrate a fraud upon the court.<sup>7</sup> It also will not be applied on the grounds that the court will not permit unjust enrichment.<sup>8</sup>

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Footnotes

- 1 [Cook v. Katiba](#), 190 So. 2d 309 (Fla. 1966).
- 2 [Hair v. Schellenberger](#), 966 N.E.2d 693 (Ind. Ct. App. 2012), transfer denied, 975 N.E.2d 360 (Ind. 2012).
- 3 [U.S. v. Mitchell](#), 528 F.3d 1034 (8th Cir. 2008) (applying Iowa law).
- 4 [Bank of New Cambria v. Briggs](#), 361 Mo. 723, 236 S.W.2d 289 (1951).
- 5 [Spector v. Ahrenholz](#), 107 So. 2d 34 (Fla. 3d DCA 1958).
- 6 [Cook v. Mason](#), 353 Mo. 993, 185 S.W.2d 793, 157 A.L.R. 942 (1945).  
As to rule applicable where parties are not in pari delicto, see § 89.
- 7 [Wantulok v. Wantulok](#), 67 Wyo. 22, 223 P.2d 1030 (1950).
- 8 [Wantulok v. Wantulok](#), 67 Wyo. 22, 223 P.2d 1030 (1950).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 84

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 84. Property purchased by debtor in name of another

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [172\(1\)](#), [172\(2\)](#), [174\(1\)](#), [174\(3\)](#), [176\(1\)](#)

#### A.L.R. Library

[Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 A.L.R.4th 862](#)

The courts will not aid one who has purchased property and caused the title thereto to be transferred to another for the purpose of hindering, delaying, or defrauding his or her creditors.<sup>1</sup> As bearing on the right of the fraudulent purchaser to equitable relief, there is no inherent difference between the act of a debtor conveying his or her property to another without consideration and that of a purchaser causing the title to the property purchased to be placed in the name of another where the object of such transfers is to hinder, delay, or defraud creditors.<sup>2</sup> Thus, one who vests the legal title to his or her property in another, for the purpose of putting it out of the reach of and defrauding his or her creditors, cannot recover the property on the theory that there was no consideration for the conveyance or that there was an agreement to reconvey.<sup>3</sup> In one case, a bank's alleged agreement with a plaintiff to accept a transfer of the plaintiff's property in order to hinder, delay, or defraud a third party who had a valid judgment against the plaintiff was illegal. Accordingly, the court left the plaintiff who asserted the claims based on that agreement in the position in which he placed himself as public policy prevents the courts from assisting the plaintiff in enforcing an illegal agreement or in allowing a plaintiff to recover damages based on an illegal agreement.<sup>4</sup>

Some courts, however, take the view that where one paying the purchase price of property causes the title thereto to be taken in the name of another for the purpose of avoiding creditors, a resulting trust nevertheless arises and apply the general rule<sup>5</sup> that where a party to an action may prove his or her case without showing fraud on his or her part, the fact that the transaction on which the action is based may have been tainted with improper motives or conduct will not serve as a defense in equity. In such situations, the fraudulent purpose of the purchaser is no defense in an action by him or her to have a resulting trust declared and the property conveyed to the purchaser.<sup>6</sup>

Where the purchaser's fraud bars him or her from recovering the property which he or she has caused to be transferred to another at the time it is purchased, such fraud likewise bars all others claiming through the purchaser, or in his or her right, except where creditors have been permitted to avail themselves of the purchaser's right in equity, instead of resorting to some statutory remedy for avoiding a fraudulent transfer.<sup>7</sup>

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#### Footnotes

- 1 [Hunter v. Dixon, 241 Ark. 725, 410 S.W.2d 389 \(1966\).](#)
- 2 [Hunter v. Dixon, 241 Ark. 725, 410 S.W.2d 389 \(1966\).](#)
- 3 [Estates of Kalwitz v. Kalwitz, 717 N.E.2d 904 \(Ind. Ct. App. 1999\).](#)
- 4 [Poe v. Hamlin Nat. Bank, 921 S.W.2d 515 \(Tex. App. Eastland 1996\), writ denied, \(Sept. 19, 1996\).](#)
- 5 [§ 87.](#)
- 6 [Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\).](#)
- 7 [Southworth v. Huffaker, 79 Colo. 364, 246 P. 261 \(1926\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 85

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 85. Status or validity of claims sought to be evaded; absence of injurious consequences

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8

#### A.L.R. Library

[Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 A.L.R.4th 862](#)

There is a conflict of authority as to whether relief may be granted to one who has conveyed property with the intention of hindering, delaying, or defrauding his or her creditors where the claim which the conveyance sought to evade was either nonexistent or was never established by legal process. Thus, it has frequently been held that the general rule denying relief to one who has conveyed his or her property under such circumstances is inapplicable where injurious consequences to creditors do not follow.<sup>1</sup> In some instances, as where one who did not and was not alleged to owe a debt conveyed property which belonged to him to another, the property not being subject to a debt and the conveyance being occasioned by the belief that it might become so liable because of a close relationship to the actual debtor, recovery has been allowed.<sup>2</sup> In the case of property purchased by a debtor in the name of another person, it has been held that the debtor may recover it, notwithstanding an intention to hinder, delay, or defraud creditors, where no actual injury has resulted.<sup>3</sup>

On the other hand, many courts take the view that one who makes a conveyance of property with the intention of removing it beyond the reach of one who has commenced or may commence proceedings against him or her is within the rule denying relief to fraudulent grantors against their transferees regardless of the validity of the claim asserted.<sup>4</sup>

Since a debtor's homestead is exempt property which is not susceptible of fraudulent alienation,<sup>5</sup> one who conveys a homestead may compel the person holding such property in trust to reconvey it notwithstanding the conveyance was made with intent to defraud creditors.<sup>6</sup> However, where a grantor transferred her homestead with the intent to defraud her creditors and thereafter committed perjury in falsely testifying in an action by her creditors that the conveyance was for a consideration, she could not thereafter admit the falsity of her testimony and have the conveyance set aside on the ground that it was made without consideration.<sup>7</sup>

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#### Footnotes

- 1 [Sponholtz v. Sponholtz](#), 190 So. 2d 572 (Fla. 1966).
- 2 [Wantulok v. Wantulok](#), 67 Wyo. 22, 223 P.2d 1030 (1950).
- 3 [Asam v. Asam](#), 239 Pa. 295, 86 A. 871 (1913).
- 4 [Bishop v. Bishop](#), 257 F.2d 495 (3d Cir. 1958).
- 5 [§ 75](#).
- 6 [Wantulok v. Wantulok](#), 67 Wyo. 22, 223 P.2d 1030 (1950).
- 7 [Nyswanger v. Roberts](#), 67 S.D. 362, 293 N.W. 187 (1940).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 86

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 86. Status or validity of claims sought to be evaded; absence of injurious consequences—Claims paid or discharged

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  8, 174(1), 174(4)

In a number of cases where a conveyance was made with fraudulent intent but where the claim which the conveyance sought to defeat had already been paid or otherwise discharged, the grantor has been afforded relief.<sup>1</sup> Thus, in an action brought by the administrator of a grantor of personal property to recover the property from the grantee, the court properly ruled that a constructive trust had been established and awarded the property to the grantor where, although the grantor originally conveyed the property with the intent to defraud a potential judgment creditor, no harm resulted to any creditor in that the out-of-state judgment against the grantor was reversed on appeal and was not enforceable against the property, and the constructive trust was necessary to prevent unjust enrichment of the grantees.<sup>2</sup> On the other hand, there are jurisdictions which have refused to aid a fraudulent grantor although the claims sought to be evaded had already been compromised or settled and paid.<sup>3</sup>

While payment, made subsequent to the conveyance, of a claim sought to be evaded by the conveyance has been held sufficient to warrant a reconveyance to the grantor,<sup>4</sup> relief is more generally denied, either on the basis of the "unclean hands" doctrine or on the grounds that a fraudulent conveyance which has substantially delayed a creditor is not purged by a subsequent payment.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Frey v. Onstott](#), 357 Mo. 721, 210 S.W.2d 87 (1948).
- <sup>2</sup> [Thomasi v. Koch](#), 660 P.2d 806 (Wyo. 1983).
- <sup>3</sup> [Ratliff v. Ratliff](#), 102 Va. 880, 47 S.E. 1007 (1904).

4 [Wantulok v. Wantulok, 67 Wyo. 22, 223 P.2d 1030 \(1950\).](#)

5 [Shaw v. Addison, 239 Iowa 377, 28 N.W.2d 816 \(1947\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 87

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 87. As affected by necessity for disclosure, in action, of fraudulent purpose

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  172(2), 174(1), 176(2), 188

Although a party to a fraudulent conveyance must fail, in a bid for relief, if he or she cannot make out a case without disclosing a fraudulent design,<sup>1</sup> the prevailing view is that where the rights of creditors are not involved in the suit, relief will not be denied to a party to the transfer if he or she can make out a case without referring to the facts disclosing fraud.<sup>2</sup> In addition, in balancing the equities for the purpose of determining whether relief against the grantee should be granted to one who conveys property to delay creditors, consideration should be given to the fact that the plaintiff was able to establish the trust without reference to any fraudulent conduct although the plaintiff did in fact disclose the fraud.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Bradtfeldt v. Cooke](#), 27 Or. 194, 40 P. 1 (1895).
- <sup>2</sup> [Wantulok v. Wantulok](#), 67 Wyo. 22, 214 P.2d 477, 21 A.L.R.2d 572 (1950).  
As to the application of this rule where property is purchased by the debtor in the name of another, see § 84.
- <sup>3</sup> [Wantulok v. Wantulok](#), 67 Wyo. 22, 214 P.2d 477, 21 A.L.R.2d 572 (1950).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 88

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 88. Where transferor deceived by transferee; promise to reconvey

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  172(2), 172(3), 174(4)

Generally, in the case of a fraudulent conveyance, a promise on the part of the transferee to reconvey the property to the transferor will not be specifically enforced,<sup>1</sup> at least where the parties are in pari delicto.<sup>2</sup> Even though the transferee may have induced the transferor to execute the conveyance, representing that he or she would not regard the transaction as having any legal effect, relief will not be granted to the transferor.<sup>3</sup>

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#### Footnotes

- 1 [Asher v. Asher](#), 278 Ky. 802, 129 S.W.2d 552 (1939).
- 2 [§ 89](#).
- 3 [Record v. Rochester Trust Co.](#), 89 N.H. 1, 192 A. 177, 110 A.L.R. 1218 (1937).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 89

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### Fraudulent Conveyances and Transfers

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#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### B. As Between Parties to Transaction

##### 2. Relief from Consequences of Executed Conveyance

### § 89. Relative standing of, or confidential relationship between, litigants; parties not in pari delicto

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  172(2), 172(3), 174(1), 174(3)

The relative standing of the litigants may be considered by the court in some circumstances in determining whether relief will be granted to a party to the fraudulent transaction. Where it appears that the transferor and transferee were not in pari delicto, a remedy may be accorded to the one who was less guilty than the other.<sup>1</sup> Thus, the transferor may be granted relief from the consequences of the transfer where the evidence shows that the transferee induced him or her to execute the conveyance by false representations regarding the danger of losing his or her property.<sup>2</sup> If the facts show that the plaintiff is in delicto, but not in pari delicto, his or her guilt will not prevent the plaintiff from obtaining equitable relief.<sup>3</sup> However, there is also authority to the effect that the fact that the parties are not in pari delicto will not aid the grantor where he or she is seeking affirmative relief.<sup>4</sup>

The existence of a confidential relationship between the transferor and the transferee is important in determining their relative standing.<sup>5</sup> Accordingly, the rule that a conveyance is valid between the parties thereto is not applicable to a grantor who is old, feeble-minded, and subject to undue influence.<sup>6</sup> Again, if the parties to the transfer are shown to have been client and attorney, it may be concluded, according to some of the authorities, that they were not in pari delicto, and relief may be granted to the client.<sup>7</sup>

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#### Footnotes

- <sup>1</sup> [Coleman v. Coleman](#), 48 Ariz. 337, 61 P.2d 441, 106 A.L.R. 1309 (1936).
- <sup>2</sup> [Palmer v. Foley](#), 305 Pa. 169, 157 A. 474 (1931).

- 3 Samuelson v. Ingraham, 272 Cal. App. 2d 804, 77 Cal. Rptr. 750 (1st Dist. 1969).  
4 Boothe v. Bassett, 82 Wash. 95, 143 P. 449, 7 A.L.R. 145 (1914).  
5 Hasselschwert v. Hasselschwert, 90 Ohio App. 331, 47 Ohio Op. 494, 106 N.E.2d 786 (3d Dist. Defiance  
County 1951).  
6 Palmer v. Foley, 305 Pa. 169, 157 A. 474 (1931).  
7 Lindsley v. Caldwell, 234 Mo. 498, 137 S.W. 983 (1911).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 90

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 90. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  179

Generally, fraudulent transfers may be void as between creditors<sup>1</sup> and transferees.<sup>2</sup> However, a transfer of property which comes within the definition of a fraudulent conveyance is, according to most courts, characterized as being voidable as to creditors and other persons within the protection of the statute.<sup>3</sup> Even though a vendee paid adequate consideration for a transfer of property, the transfer was void as between the creditor and the vendee where the vendor transferred the property with the intent to delay, hinder, or defraud the creditor, and the vendee received the property with notice of the vendor's intent.<sup>4</sup> Where the transferee participated in the grantor's fraud, his or her rights are inferior to those of the grantor's creditors, and on the setting aside of the conveyance, the transferee is not entitled to protection to the extent of the consideration paid by him or her for the property.<sup>5</sup> Where, however, the grantee in a fraudulent conveyance or transfer is not guilty of actual fraud but is chargeable with knowledge of facts which warrant the law in holding him or her guilty of constructive fraud, the authorities generally hold that the grantee is entitled to protection to the extent of the consideration paid by him or her.<sup>6</sup> A state's constructive fraudulent transfer statute, however, can be the basis for imposing personal liability against a transferee and not just a transferor.<sup>7</sup> Moreover, a transferee may be liable under the Uniform Fraudulent Transfer Act for the debts of a transferor who fraudulently conveys assets to the transferee.<sup>8</sup> As to all others than creditors, a fraudulent conveyance is legal and valid and can be enforced in all of its terms as any other contract.<sup>9</sup>

In a jurisdiction which recognizes the void, not voidable nature of fraudulent transactions, at least as to creditors, if the transferee of fraudulently conveyed property is a good faith purchaser who gives reasonably equivalent value, the transfer is not voidable in an avoidance action. If the transferee is not a good faith purchaser for reasonably equivalent value, the transfer is void, and the creditor may seek to set it aside in an avoidance action.<sup>10</sup>

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Footnotes

- 1 Taylor v. Clark, 140 S.W.3d 242 (Mo. Ct. App. S.D. 2004).
- 2 Schaefer v. Schaefer, 795 N.W.2d 494 (Iowa 2011).
- 3 § 77.
- 4 Hawes v. Central Texas Production Credit Ass'n, 492 S.W.2d 714 (Tex. Civ. App. Austin 1973), writ granted, (June 6, 1973) and judgment aff'd, 503 S.W.2d 234 (Tex. 1973).
- 5 O'Neill v. Little, 107 N.J. Super. 426, 258 A.2d 731 (Ch. Div. 1969).
- 6 Glover v. Berger, 75 Wyo. 191, 294 P.2d 793, 60 A.L.R.2d 583 (1956).
- 7 Sarasota CCM, Inc. v. Kuncman, 466 B.R. 590 (E.D. N.Y. 2012) (applying New York law).
- 8 Griffin v. C.I.R., T.C. Memo. 2011-61, T.C.M. (RIA) P 2011-061 (2011) (applying Florida law).
- 9 Hair v. Schellenberger, 966 N.E.2d 693 (Ind. Ct. App. 2012), transfer denied, 975 N.E.2d 360 (Ind. 2012).
- 10 In re Cass, 476 B.R. 602 (Bankr. C.D. Cal. 2012) (applying California law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 91

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 91. Rights and liabilities of transferee under Uniform Fraudulent Transfer Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  179

The Uniform Fraudulent Transfer Act provides several circumstances in which a transfer or obligation is not voidable. A transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee where the transfer is made with actual intent to hinder, delay, or defraud the creditor under section 4(a)(1) of the Act.<sup>1</sup> A transfer also is not voidable under [section 4\(a\)\(2\)](#), referring to the debtor's financial state where the debtor does not receive reasonably equivalent value, or section 5 of the Act, referring to transfers fraudulent as to present creditors, if the transfer results from the termination of a lease upon the default of the debtor when the termination is pursuant to the lease and applicable law or enforcement of a security interest under U.C.C. Article 9 setting forth the Secured Transactions provisions of the Uniform Commercial Code.<sup>2</sup> Also, a transfer is not voidable under section 5(b) of the Act:<sup>3</sup>

- to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;
- if made in the ordinary course of business or financial affairs of the debtor and the insider; or
- if made pursuant to a good-faith effort to rehabilitate the debtor, and the transfer secured present value given for that purpose, as well as an antecedent debt of the debtor.

Notwithstanding voidability of a transfer or an obligation, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:<sup>4</sup>

(1) a lien on or a right to retain any interest in the asset transferred;

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

To the extent that a transfer is voidable in an action by a creditor to avoid the transfer to the extent of its claim, the creditor may recover judgment for the value of the asset transferred, subject to adjustment as the equities require, or the amount necessary to satisfy the creditor's claim, whichever is less.<sup>5</sup> If the judgment is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.<sup>6</sup> The judgment may be entered against the first transferee of the asset or the person for whose benefit the transfer was made or any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.<sup>7</sup>

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#### Footnotes

- 1 [Unif. Fraudulent Transfer Act § 8\(a\).](#)  
As to [Unif. Fraudulent Transfer Act § 4\(a\)\(1\)](#), see [§ 106](#).
- 2 [Unif. Fraudulent Transfer Act § 8\(e\).](#)  
As to [Unif. Fraudulent Transfer Act § 4\(a\)\(2\)](#), see [§ 108](#).  
As to the enforcement of security interests under U.C.C. Article 9, see [Am. Jur. 2d, Secured Transactions §§ 529 to 682](#).
- 3 [Unif. Fraudulent Transfer Act § 8\(f\).](#)  
As to voidability under section 5(b) of the Act, see [§ 65](#).
- 4 [Unif. Fraudulent Transfer Act § 8\(d\).](#)
- 5 [Unif. Fraudulent Transfer Act § 8\(b\).](#)
- 6 [Unif. Fraudulent Transfer Act § 8\(c\).](#)
- 7 [Unif. Fraudulent Transfer Act § 8\(b\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 92

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 92. Effect of transferee's intent, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  185 to 187

#### Forms

[Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances § 105](#) (Answer—Defense—Transferee paid for and received transfer as bona fide purchaser)

The Uniform Fraudulent Transfer Act allows creditors to seek relief from first transferees without regard to the transferees' intent<sup>1</sup> or wrongful conduct.<sup>2</sup> The structure of that statute indicates that while fraudulent transfers may or may not include a culpable mental state, once a transfer has been found to be fraudulent, a remedy is available against transferees.<sup>3</sup>

A state's Uniform Fraudulent Transfer Act provision that allows relief of avoidance to the extent necessary to satisfy the creditor's claim is expressly made subject to limitations that include a reduction for what a good faith transferee paid.<sup>4</sup> Thus, to determine the actual amount of a Ponzi scheme investor's liability, the court permits good faith investors to retain payments up to the amount invested and requires disgorgement of only the profits paid to them by the Ponzi scheme.<sup>5</sup>

**Practice Tip:**

A transferee who assisted in a fraudulent conveyance may be sued directly by the creditor for a fraudulent conveyance, and there is no need to resort to a claim of aiding and abetting.<sup>6</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Investors who profited from Ponzi scheme perpetrated by bank failed to show that they accepted fraudulent transfers in good faith, as required under Texas Uniform Fraudulent Transfer Act's (TUFTA) good faith affirmative defense for investors to retain fraudulent transfers received while on inquiry notice of Ponzi scheme, in action brought by receiver appointed to recover bank's assets and distribute them to victims of Ponzi scheme, where there was no evidence that investors diligently investigated their initial suspicions of bank's fraud while on inquiry notice. [Tex. Bus. & C. Code § 24.009\(a\)](#). [Janvey v. GMAG, L.L.C.](#), 977 F.3d 422 (5th Cir. 2020).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 [Tareco Properties, Inc. v. Morriss](#), 196 Fed. Appx. 358, 2006 FED App. 0623N (6th Cir. 2006) (applying Tennessee law); [In re Reading Broadcasting, Inc.](#), 390 B.R. 532 (Bankr. E.D. Pa. 2008) (applying Pennsylvania law); [Thompson v. Hanson](#), 168 Wash. 2d 738, 239 P.3d 537 (2009).
- 2 [August v. August](#), 2009 WL 458778 (Del. Ch. 2009).
- 3 [Thompson v. Hanson](#), 168 Wash. 2d 738, 239 P.3d 537 (2009).
- 4 [In re JTS Corp.](#), 617 F.3d 1102 (9th Cir. 2010), cert. denied, 131 S. Ct. 2930, 180 L. Ed. 2d 224 (2011) (applying California law).
- 5 [Donell v. Kowell](#), 533 F.3d 762 (9th Cir. 2008) (applying California law).
- 6 [Amusement Industry, Inc. v. Midland Avenue Associates, LLC](#), 820 F. Supp. 2d 510 (S.D. N.Y. 2011) (applying New York law).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 93

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 93. Payment of consideration by transferee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  168

In order to acquire a right which is superior to that of the transferor's creditors, the transferee must pay value for the disputed property, acting in good faith. It is not sufficient, in order to confer upon the transferee the status of a bona fide purchaser for value, to show that he or she has merely secured payment of the purchase money.<sup>1</sup> When the transferee has given equivalent value in exchange for the debtor's property, the statutory requirement of good faith is satisfied if the transferee acted without either actual or constructive knowledge of any fraudulent scheme.<sup>2</sup> Where there is no consideration for a conveyance, the grantee's knowledge, intent, or participation in the fraud of the grantor is immaterial, and the grantee is not justified in claiming damage.<sup>3</sup>

A grantee who has innocently made part payments upon the purchase price prior to learning of the purpose of the conveyance may have a lien upon the premises as security for such payments.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Fluegel v. Henschel](#), 7 N.D. 276, 74 N.W. 996 (1898).
- <sup>2</sup> [ADM Associates, Inc. v. Grease 'N Go, Inc.](#), 905 F. Supp. 79 (E.D. N.Y. 1995).
- <sup>3</sup> [Waukesha County Dept. of Social Services v. Loper](#), 53 Wis. 2d 713, 193 N.W.2d 679 (1972).
- <sup>4</sup> [Angers v. Sabatinelli](#), 235 Wis. 422, 293 N.W. 173, 128 A.L.R. 1491 (1940).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 94

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 94. Acquisition of knowledge of fraud pending payment of consideration

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  159(1), 160 to 163, 165

In order to be entitled to the standing of an innocent purchaser for value, the transferee must have acted without knowledge of the transferor's fraudulent purpose not only at the time of the purchase but also at the time of the actual payment of the consideration.<sup>1</sup> One who has received a conveyance of the title of property and has paid a part of the purchase money, but who, before paying the full amount, has acquired knowledge of the vendor's fraud, is not, ordinarily, entitled to protection as a bona fide purchaser except to the extent of the money paid by him or her before receiving such notice.<sup>2</sup> But mere knowledge that a proposed grantor is in debt does not charge the purchaser with notice that the grantor is selling to defraud his or her creditors.<sup>3</sup>

The transferee will be permitted to retain the property, and the creditors will be limited to recovery of the part of the purchase price which is still owing, where hardship will be suffered by the transferee if the property is taken from him or her—for example, where he or she has made improvements, where the complaining creditor appears to have been negligent in failing to discover and inform the transferee of the transferor's fraudulent design, or where only a small part of the price was unpaid when notice was received.<sup>4</sup> In the case of a fraudulent conveyance on the consideration of marriage, where the fraudulent intent of the grantor becomes known to the grantee following the agreement to marry, but prior to the actual marriage, the consideration is the agreement to marry, and not the marriage, and is, therefore, complete prior to the discovery of the fraud.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Fluegel v. Henschel](#), 7 N.D. 276, 74 N.W. 996 (1898).

<sup>2</sup> [Fluegel v. Henschel](#), 7 N.D. 276, 74 N.W. 996 (1898).

- 3 [Interstate Acceptance Corp. v. Lovins, 380 S.W.2d 805 \(Ky. 1964\).](#)
- 4 [Henry v. Phillips, 163 Cal. 135, 124 P. 837 \(1912\).](#)
- 5 [Prignon v. Daussat, 4 Wash. 199, 29 P. 1046 \(1892\).](#)

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 95

American Jurisprudence, Second Edition | May 2021 Update

### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 95. Extent of transferee's liability to creditors; discharge of obligation by transferee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  162.1, 163, 181(1), 185 to 187

Where a transferee is not a bona fide purchaser for value, the law requires the transferee to surrender that which he or she has acquired from the debtor, the measure of liability being the return of the property<sup>1</sup> or the payment of its equivalent in money. Where the property is not returned or cannot be reached, the transferee is liable to the extent of its value.<sup>2</sup> A good faith transferee is entitled to a reduction in the amount of the liability on the judgment up to the value given the debtor for the transfer or obligation.<sup>3</sup> Liability is furthermore limited to the value of the property received by the transferee, and for good faith transferees, liability is further limited to the net value received, i.e., the value of the asset transferred less the value given the debtor.<sup>4</sup> This rule has been applied, for instance, where the transferee is the spouse of the transferor.<sup>5</sup> However, a personal liability which can be enforced against the wife's separate property does not attach to her.<sup>6</sup>

Where the transferee is accountable to the transferor's creditors, the transferee may discharge him- or herself from liability by paying to them a sum of money equal to the value of the property.<sup>7</sup> However, where the transferee claims to have paid the value of the property to creditors, the burden is on him or her to show not only the fact of payment but also the further fact that the debts discharged were subsisting, legal, bona fide demands against the transferor.<sup>8</sup>

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#### Footnotes

- 1 [Cohen v. Heavey](#), 261 Cal. App. 2d 766, 68 Cal. Rptr. 180 (2d Dist. 1968).  
2 [W. R. Willett Lumber Co. v. Hall](#), 375 S.W.2d 266 (Ky. 1964).



- 3 Thompson v. Hanson, 168 Wash. 2d 738, 239 P.3d 537 (2009).  
4 Thompson v. Hanson, 168 Wash. 2d 738, 239 P.3d 537 (2009).  
5 Bigby v. Warnock, 115 Ga. 385, 41 S.E. 622 (1902).  
6 Clark v. Beecher, 154 U.S. 631, 14 S. Ct. 1184, 24 L. Ed. 705 (1878).  
7 First Nat. Bank v. Love, 232 Ala. 327, 167 So. 703 (1936).  
8 Union Trust Co. v. National Indem. Co., 23 Pa. D. & C. 47, 1934 WL 4209 (C.P. 1934).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 96

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 96. Effect of foreclosure or execution sale of property transferred; redemption by transferee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  [181\(1\)](#), [182\(1\)](#), [182\(2\)](#), [184](#)

Where a fraudulent grantee attempts to hold title to the premises fraudulently conveyed by acquiring an outstanding title or interest thereto subsequent to the fraudulent conveyance, the transferee's redemption from a mortgage foreclosure inures to the transferor's creditors as if the transferor had made the redemption.<sup>1</sup> However, where the fraudulent grantee's title is divested by an execution or foreclosure sale and the fraudulent grantee subsequently becomes the purchaser of the property at the judicial sale, his or her title cannot be subjected to satisfy the debts of the fraudulent grantor.<sup>2</sup>

A fraudulent grantee owes no duty to protect the fraudulently conveyed property from prior mortgages. Thus, where a mortgage is foreclosed, and the title acquired by the purchaser at the foreclosure sale becomes absolute by expiration of the period for redemption, all rights under the fraudulent conveyance are terminated, and the defrauded creditor cannot subject the title to payment of his or her claim.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Svalina v. Saravana](#), 341 Ill. 236, 173 N.E. 281, 87 A.L.R. 821 (1930).
- <sup>2</sup> [Texas Hide & Leather Co. v. Bonds](#), 1932 OK 90, 155 Okla. 3, 8 P.2d 20 (1932).
- <sup>3</sup> [Humphrey v. McCleary](#), 171 Minn. 197, 213 N.W. 892 (1927).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 97

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

###### 1. In General

### § 97. Rights with respect to proceeds of property insurance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  181(4)

Insurance effected on property conveyed in fraud of creditors does not take the place of the property after its destruction by fire, and accordingly, the proceeds of such insurance are not subject to the claims of the grantor's creditors.<sup>1</sup> Nor is the rule altered by the fact that the premiums on the insurance were paid by the debtor.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [In re Waters](#), 93 F.2d 196, 114 A.L.R. 1368 (C.C.A. 5th Cir. 1937); [Underwood v. Winslow](#), 234 Mass. 550, 125 N.E. 631 (1920).

<sup>2</sup> [Forrester v. Gill](#), 11 Colo. App. 410, 53 P. 230 (1898).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 98

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

##### 2. Accountability and Reimbursement of Transferee

## § 98. Accountability of transferee for rents and profits

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  182(3), 316

### A.L.R. Library

[Accountability and liability for rents and profits of grantee of fraudulently conveyed real property, 60 A.L.R.2d 593](#)

A grantee to whom real property has been conveyed in fraud of the grantor's creditors is generally liable to account for the rents and profits from the property.<sup>1</sup>

Where the property has been transferred in trust, the transferee agreeing to hold it for the use and benefit of the transferor-debtor, the authorities are agreed that the transferee may be held accountable for rents and profits.<sup>2</sup>

If the proceeds of a sale of the fraudulently conveyed real property are sufficient to pay the claims of the grantor's creditors, the grantee will not be required to account for the rents and profits of the property.<sup>3</sup> Recovery of rents and profits has also been denied for the reason that the creditor failed to make seasonable application for an accounting.<sup>4</sup>

Where a conveyance was constructively fraudulent and the grantees had not actually received rents, the grantees were not liable for the reasonable rental value of the property since the date of conveyance.<sup>5</sup>

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Footnotes

- 1 [Griffin v. McCullough Tool Co.](#), 265 S.W.2d 131 (Tex. Civ. App. Fort Worth 1954), writ refused n.r.e.
- 2 [First Nat. Bank v. Love](#), 232 Ala. 327, 167 So. 703 (1936).
- 3 [Abbey v. Zimmerman](#), 12 Cal. App. 2d 311, 55 P.2d 903 (4th Dist. 1936).
- 4 [Wolfson v. Samfred Holding Corp.](#), 237 A.D. 913, 262 N.Y.S. 102 (2d Dep't 1933).
- 5 [Tcherepnin v. Franz](#), 489 F. Supp. 43 (N.D. Ill. 1980).

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## 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 99

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### Fraudulent Conveyances and Transfers

Glenda K. Harnad, J.D. and Sonja Larsen, J.D.

#### V. Validity and Effect of Transfer; Incidental Rights and Liabilities

##### C. As Between Transferee and Creditors or Other Third Persons

##### 2. Accountability and Reimbursement of Transferee

## § 99. Reimbursement or credit for expenditures

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Fraudulent Conveyances](#)  183, 184

If the transferee that received property in a fraudulent conveyance did not participate in the fraud, it is entitled to reimbursement for taxes and other expenditures.<sup>1</sup>

Constructive fraud does not preclude the transferee from reimbursement on account of sums which he or she is shown to have expended for the benefit or preservation of the property.<sup>2</sup> Moreover, in the majority of cases, a fraudulent grantee, whether guilty of actual or of only constructive fraud, was entitled to set off against rents and profits at least some of the expenditures the grantee made in relation to the property conveyed, the theory of these cases being that the creditor is entitled merely to be placed as nearly as possible in the position he or she would have been in if the conveyance had never in fact been made and that the expenditures inured to the benefit of the defrauded creditors.<sup>3</sup>

In other cases, the transferee could not set off various payments that the transferee had made against rents and profits since, by participating in the fraud, the transferee was precluded from claiming these allowances.<sup>4</sup> Thus, a transferee is not entitled, as against the grantor's creditors when the conveyance is set aside, to reimbursement for expenditures made by it for the payment of taxes or improvements made to the property and cannot impose a lien on the property if it actively participated in the fraud.<sup>5</sup> Accordingly, where the conveyance is set aside, the transferee, having been guilty of actual fraud, may not demand reimbursement for expenditures<sup>6</sup> or claim subrogation to the rights of persons whose liens he or she may have discharged.<sup>7</sup> Recovery for such payments has also been denied in cases in which the creditor sought to have the conveyance set aside as fraudulent but did not ask for an accounting by the grantee of the rents and profits.<sup>8</sup>

Footnotes

- 1 [Sumpter v. U.S.](#), 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).
- 2 [Berger v. Loomis](#), 169 Or. 575, 131 P.2d 211, 144 A.L.R. 636 (1942).
- 3 [Newman v. First Nat. Bank](#), 76 F.2d 347 (C.C.A. 3d Cir. 1935); [Patterson v. Missler](#), 238 Cal. App. 2d 759, 48 Cal. Rptr. 215 (4th Dist. 1965); [Angers v. Sabatinelli](#), 235 Wis. 422, 293 N.W. 173, 128 A.L.R. 1491 (1940).
- 4 [U.S. v. Select Meat Co.](#), 275 F. Supp. 38 (W.D. Tex. 1967).
- 5 [Sumpter v. U.S.](#), 302 F. Supp. 2d 707 (E.D. Mich. 2004), subsequent determination, 314 F. Supp. 2d 684 (E.D. Mich. 2004) (applying Michigan law).
- 6 [Milwaukee & M.R. Co. v. Soutter](#), 80 U.S. 517, 20 L. Ed. 543, 1871 WL 14811 (1871); [Sheridan v. McCormick](#), 39 N.D. 641, 168 N.W. 59, 8 A.L.R. 523 (1918).
- 7 [Sheridan v. McCormick](#), 39 N.D. 641, 168 N.W. 59, 8 A.L.R. 523 (1918).
- 8 [Glover v. Berger](#), 75 Wyo. 191, 294 P.2d 793, 60 A.L.R.2d 583 (1956).

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